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TREATISE ON DAMAGES

COVERING THE

ENTIRE LAW OF DAMAGES

BOTH

GENERALLY AND SPECIFICALLY

BY

JOSEPH A. JOYCE

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IN THREE VOLUMES

Vol. II.

THE BANKS LAW PUBLISHING CO.

21 MURRAY STREET, NEW YORK

1903

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February 11, 1905
No. 75.2.57

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CHAPTER XXIX.

DEATH—"FAIR AND JUST" DAMAGES "WITH REFERENCE TO THE NECESSARY INJURY"—"SHALL FORFEIT AND PAY"—DIRECT DAMAGES.

§ 675. "Shall forfeit and pay . . . the sum of"—Common carriers—Penalty.
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690. "Fair and just" damages "with reference to the necessary injury"—Death of husband—Probable accumulations.
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708. Death — Defenses—Acquittal of murder—Avoiding conflict—Self - defense—Exemplary damages.
709. Death—Defenses—Mitigation of damages—Improper relations with wife.

§ 675. "Shall forfeit and pay . . . the sum of"—Common carriers—Penalty.—The statutes of Colorado,[1] Missouri,[2] and New Mexico,[3] provide that in actions against designated

[1] Mills' Ann Stat. 1891, p. 1003, sec. 1508; Gen. Stat. 1883, sec. 103.

[2] Rev. Stat. sec. 2864, p. 727; Rev. Stat. 1889, sec. 4425.

[3] Comp. L. 1897, p. 810, sec. 3213;

common carriers for death from injury occasioned by the negligence, unskillfulness or criminal intent of any officer, agent, servant or employee while engaged in certain duties, such common carrier "shall forfeit and pay for every person and passenger so injured,"[4] or "so dying,"[5] a specified sum.[6] It is decided that this statute[7] is not open to the objection of unconstitutionality on the grounds; first, that it attempts to deprive the defendant corporation of property without due process of law in authorizing a judgment against it as one of a special class of individuals, and second, in that it arbitrarily liquidates and admeasures the quantum of damages without a trial by jury. It is also declared that under said enactment the amount of damages is fixed and is thereby expressly conferred upon the designated beneficiaries,[8] and that the amount recoverable is in the nature of liquidated compensatory damages rather than a penalty.[9] As we have elsewhere stated, not every action against a railroad company, and we would include other common carriers, for death losses would come within the provisions of these statutes, especially in view of the express statutory defenses of no negli-

Comp. L. 1884, sec. 2308; Amended Laws, 1891, ch. 49.

[4] Colo. Stat. above stated.

[5] Mo. and N. M. Stat. above cited.

[6] $5,000 in Mo. and N. M. and "not exceeding" $5,000 and "not less than" $3,000 in Colo.

[7] Rev. Stat. 1879, sec. 2121; Rev. Stat. 1889, sec. 4425.

[8] Carroll v. Missouri P. R. Co., 88 Mo. 239; 3 West. 839.

[9] Coover v. Moore, 31 Mo. 574, where the court says: "From the fact that under this act only certain persons presumed to be interested in the life of the deceased, may institute an action under it, and that there are large classes of persons whose lives are in no manner protected by the provisions of the act, it appears that the sum which may be recovered is not intended as a penalty, but as compensatory damages liquidated by the statute." Id. 576, per Bates, J. But in Philpott v. Missouri P. R. Co., 85 Mo. 164, the court says: "The statute is remedial and is designed to be compensatory in part. But it is more than this. The case at bar demonstrates the fact that it cannot be wholly compensatory, for the amount of the recovery, being fixed as it is, is altogether out of proportion to the value of the services of the son for the remainder of the period of his minority. The law is also designed to guard and protect persons and the traveling public against the wrongful acts thereby prohibited. Whether the amount awarded is denominated damages, compensatory damages, liquidated, as was said in Coover v. Moore et al., 31 Mo. 574, or a penalty, is not material. The law, as well as being compensatory, is of a penal and police nature, and can, without objections, subserve both purposes at one and the same time." Id. 168, per Black, J.

gence and of other factors. Thus the fact should be considered that the death of a person not a passenger was not occasioned by the negligence of the servants of the railroad company while running, managing or conducting a train of cars. But if the killing was so occasioned or resulted from a failure to fulfill any of the obligations of the statute awarding such penalty or resulted from the nonperformance of some other statutory duty which would bring it within the terms of this forfeiture statute, then the measure of damages would be the sum fixed thereby,[10] and this latter would apply to the neg-

[10] See King v. Missouri P. R. Co., 98 Mo. 235; 11 S. W. 563, not under Rev. Stat. 1879, sec. 2121, but under sec. 2123. The court, per Black, J., said in this case. "By the instruction given, the plaintiff was allowed to recover the fixed sum of five thousand dollars, whether the death resulted from a failure to ring the bell or sound the whistle, or from a failure to have erected a sign board. To award that amount, the jurors were not required to even find that the two causes combined to produce the death, but they were in terms told to give a verdict for five thousand dollars, whether death resulted from one or the other of these causes. To be entitled to recover five thousand dollars as a fixed sum, the plaintiff's case must come within Revised Statutes, 1879, section 2121. That amount is allowed in the cases therein specified for a twofold purpose, first, compensation, and second, as a penalty to protect the public against repetitions of like wrongs." See also, Cromley v. Hannibal & St. J. R. Co., 98 Mo. 34; 11 S. W. 244; Rappo v. St. Joseph & I. R. Co., 106 Mo. 423; 17 S. W. 487; Becke v. Missouri P. R. Co., 102 Mo. 544; 13 S. W. 1053; Schlerett v. Missouri P. R. Co., 96 Mo. 509; 10 S. W. 66; Cubertson v. Metropolitan St. R. Co., 140 Mo. 35; 36 S. W. 834. The court, per Gantt, P. J., said in this case: "Defendant challenges this instruction because it fixed the verdict arbitrarily at $5,000. The acts specified in the instruction included negligence 'in failing to employ capable watchmen' and 'in failing to have a sufficient number of watchmen at the junction in question,' and then 'negligence in the gripman in operating the train.' Now negligence in employing incompetent flagmen, and in not having a sufficient number of competent flagmen, is not 'negligence in operating the car or train,' and in such cases the verdict is not fixed at $5,000 but the jury may give a sum not exceeding $5,000. It has been uniformly ruled in this state that where different acts of negligence are alleged and relied upon and some of them bring the case within the penalty clause of section 4425 and others bring the case withing section 4426, it is error to instruct solely for the penalty." Id. p. 63. The penalty under sec. 4425 is recoverable for a breach of the duty imposed by sec. 2608, as to warning signals at railroad crossing. Kenney v. Hannibal & St. J. R. Co. 105 Mo. 270; 16 S. W. 837, aff'g 15 S. W. 983. See as to failure to ring bell at public crossing, Herring v. Wabash R. Co., 80 Mo. App. 562; 2 Mo. App. 707.

ligent killing of one upon the railroad by license of the company.[11]

§ 676. "Shall forfeit and pay" "the sum of"—Penalty—Death of railroad employee.—In determining whether or not the full measure of damages fixed by statute in Missouri by way of a forfeiture or penalty in actions against railroads should be awarded, the doctrine of fellow servants is involved in cases of the killing of its employee by a railroad company through the negligence, etc., of its agents or servants. Thus it is held that an action for the death of a track walker was within the forfeiture enactment entitling his representatives to recover the full sum specified of five thousand dollars, where the death was caused by the negligence of trainmen, since deceased was not a fellow servant with them.[12] So where the death of a railroad sectionman is occasioned by the negligence of the foreman of his gang, or a train conductor, the measure of damages is the sum fixed by way of a forfeit or penalty under the statute.[13]

§ 677. "Fair and just" damages "with reference to the necessary injury"—"Mitigating or aggravating circumstances."—Under the general provision of the statutes of Colorado and Missouri "the jury may give such damages as they may deem fair and just . . . with reference to the necessary injury, resulting from such death . . . and also having regard to the

[11] Le May v. Missouri P. R. Co., 105 Mo. 361; 16 S. W. 1049. See note A at end of this chapter.

[12] Sullivan v. Missouri P. R. Co., 97 Mo. 113; 10 S. W. 852, under Mo. Rev. Stat., 1879, sec. 2121 (Rev. Stat. 1889, sec. 4425). See Magoffin v. Missouri P. R. Co., 102 Mo. 540; 15 S. W. 76; 22 Am. St. Rep. 798, holding that a postal clerk was not a railroad employee but occupies substantially a position of passenger, although not in fact one. Cobb v. St. Louis & H. R. Co., 149 Mo. 609; 50 S. W. 894; 13 Am. & Eng. R. Cas. N. S. 632, holds that expressman is not a fellow servant of railroad employees. This case is briefly noted in extended note at end of this chapter.

[13] Miller v. Missouri P. R. Co., 109 Mo. 350; 19 S. W. 58; 32 Am. St. Rep. 673. It was also held in this case that the foreman of a gang of track repairers and the conductor of a material train, the former having authority to direct his men and the latter having control of the train, were not fellow servants but vice principals. See Schlerette v. Missouri P. R. Co., 115 Mo. 87; 21 S. W. 1110; 19 S. W. 1134; 96 Mo. 509; 10 S. W. 66. This case briefly noted below in note as to liability and fellow servants at end of this chapter. See cases cited, sec. 680, herein.

mitigating or aggravating circumstances attending any such wrongful act, neglect or default," but the amount awarded must not exceed five thousand dollars.[14]

§ 678. "Fair and just" damages "with reference to the

[14] Mills' Annot. Stat. 1891, p. 1007, sec. 1509. See id. p. 1009, sec. 1512; Colo. Gen. Stat. 1883, secs. 1031, 1032; Mills' Ann. Stat. 1891, secs. 1510, 1512; Rev. Stat. Mo. sec. 2866, p. 729; Mo. Rev. Stat. 1889, secs. 4426, 4427; Mo. Rev. Stat. 1879, sec. 2123. The statutes of Colorado and Missouri also provide for the recovery by way of a penalty or forfeiture for death occasioned by common carriers. Mills' Ann. Stat. 1891, p. 1003, secs. 1508, 1509; Colo. Gen. Stat. 1883, sec. 1030; Mo. Rev. Stat. p. 727, sec. 2864; Mo. Rev. Stat. 1889, sec. 4425. See Gen. Stat. Mo. ch. 147, sec. 2, p. 601; Wag. Stat. pp. 519, 520; Mo. Rev. Stat. 1879, sec. 2121, and under the miner's act of Missouri, a right of action accrues for direct damages sustained. Rev. Stat. 1889, sec. 7074. The penalty statutes and miner's acts are considered elsewhere herein. See also Colo. Employer's Liability Act, 1893, Session Laws, 1893, ch. 77, given in full in Reno's Employer's Liability Acts (ed. 1896), p. 373. Under this act the parties entitled to sue and recover damages shall have the same right of compensation and remedy against the employer as if the employee had not been an employee and the amount of compensation where the personal injury results solely from the negligence of a co-employee shall not exceed $5,000. See Supp. to Mills' Ann. Stat. 1891–1896, pp. 422–425, secs, 1511a, 1511b–1511e. See Sess. Laws, Colo. 1901, ch. 67, pp. 161, 162. As to survival of rights of action for injuries to the person, see Ann. Stat. sec. 2917; Mo. Rev. Stat. 1868, p. 682, sec. 154, providing for the survival of all actions at law to and against executors and administrators, except trespass for injuries to the person, including actions of trespass on the case. Held to include all forms of action for trespass for personal injuries. Munal v. Brown (U. S. C. C. D. Colo.), 70 Fed. 967. See also Letson v. Brown, 11 Colo. App. 11; 52 Pac. 287. Under Colo. Civ. Code, sec. 15, an action is not abated by the substitution of a foreign executor in place of plaintiff, who dies during pendency of the action, but an administrator may be substituted. Williams v. Carr (Colo. App.), 36 Pac. 644. Under Colo. Laws, 1877, p. 343, giving heirs a right of action for death in certain cases, "heir or heirs" means "child or children" and the right of action is limited to lineal descendants. Hindry v. Holt, 24 Colo. 464; 51 Pac. 1002; 39 L. R. A. 351, citing several cases. That a cause of action for injury negligently inflicted as well as for one wilfully inflicted, abates upon defendant's death, see Letson v. Brown, 11 Colo. App. 11; 52 Pac. 287. A general statute for wrongful death does not operate in favor of a nonresident alien unless it expressly so provides. Brannigan v. Union Gold Min. Co. (U. S. C. C. D. Colo.), 93 Fed. 164; 2 Denver Leg. Adv. 353, citing Deni v. Pennsylvania R. Co., 181 Pa. 527, dis'g Luke v. Calhoun Co., 52 Ala. 118.

necessary injury"—"Aggravating circumstances"—Exemplary damages—Pecuniary loss.—It would seem that the above wording of the statute would justify awarding exemplary damages where there were aggravating circumstances attending the cause of death, but it has been held in Colorado that an instruction following the statutory language was not objectionable as permitting exemplary damages, when the correct measure of compensatory damages was given in the same charge to the jury.[15] So in another case where it was charged that mitigating or aggravating circumstances, connected with the neglect or injury, might be considered in arriving at the amount to be awarded, which would be such a sum within the statutory limit as would compensate the plaintiff in a pecuniary sense for the loss, if any, suffered, it was decided that the instruction did not permit exemplary damages.[16] Again, it is held in this state that an instruction is erroneous, which does not limit the damages to the pecuniary loss contemplated by the statute.[17] In Missouri the court approved in a comparatively recent case an instruction that if the jury found for the plaintiff, they would award her "such damages not exceeding five thousand dollars as you may deem fair and just, under the evidence in this case, with reference to the necessary injury resulting to her from the death of her husband."[18] It was also held that it was proper to refuse an instruction restricting the widow's compensation to the present money loss suffered by her.[19] And where one is wantonly and maliciously killed by a railroad employee, exemplary damages may be recovered, the above section of the statute providing for fair and just damages with reference to aggravating circumstances.[20]

[15] Moffatt v. Tenney, 17 Colo. 189; 30 Pac. 348.

[16] Hayes v. Williams, 17 Colo. 465; 30 Pac. 352. See Kansas P. R. Co. v. Miller, 2 Colo. 442, 465, 466, 467; 3 Colo. 100.

[17] Denver & R. G. R. Co. v. Spencer, 25 Colo. 9; 52 Pac. 211; 10 Am. & Eng. R. Cas. N. S. 536. Examine the Missouri decisions given below.

[18] Citing Browning v. Wabash Western R. Co., 124 Mo. 55; 27 S. W. 644 (this case aff'd 24 S. W. 731); Boettger v. Schorpe & K. Agric. I. Co., 124 Mo. 87.

[19] Barth v. Kansas City El. R. Co., 142 Mo. 535; 44 S. W. 778; 10 Am. & Eng. R. Cas. N. S. 281; 3 Am. Neg. Rep. 682, under Mo. Rev. Stat. 1889, sec. 4427, citing Blake v. Midland Ry. Co., 18 Q. B. 93; Tilley v. Hudson R. Co., 24 N. Y. 471.

[20] Haehl v. Wabash R. Co., 119 Mo. 325; 24 S. W. 737, under secs. 4426, 4427, Rev. Stat. 1889. In this case the killing was by a watchman of

So the rule in this state is that where there are aggravating circumstances, exemplary damages not exceeding five thousand dollars may be given, otherwise the "necessary" or pecuniary loss sustained is the measure of damages, although the beneficiaries' mental suffering cannot be considered.[21]

§ 679. "Fair and just" damages "with reference to the necessary injury"—Actions against railroads.—Although there is a special statute in Missouri providing for the recovery of a specific sum in actions against common carriers for loss by death in certain cases, yet these are dependent upon negligence, unskillfulness or criminial intent of agents, servants, etc., or upon a defect or insufficiency in any railroad, etc., resulting therefrom,[22] or from a nonperformance of some statutory duty.[23]

defendant employed to keep trespassers off its bridge after being ordered to leave the bridge and while attempting so to do.

[21] Barth v. Kansas City El. R. Co., 142 Mo. 535; 44 S. W. 778; 10 Am. & Eng. R. Cas. N. S. 281; 3 Am. Neg. Rep. 682, under Mo. Rev. Stat. 1889, sec. 4427; Schaub v. Hannibal & St. J. R. Co. (Mo.), 16 S. W. 924; McGowan v. St. Louis, O. & S. Co., 109 Mo. 518; 19 S. W. 199; 16 S. W. 236; Gray v. McDonald, 104 Mo. 303; 16 S. W. 398, under Mo. Stat. 1879, secs. 2122, 2123; Parsons v. Missouri P. R. Co., 94 Mo. 286; 6 S. W. 464; 12 West. 615; Smith v. Wabash St. L. & P. R. Co., 92 Mo. 360; 4 S. W. 129; 1 Am. St. Rep. 729; Stoher v. St. Louis, I. M. & S. Ry. Co., 91 Mo. 509; 4 S. W. 389; Nichols v. Winfrey, 79 Mo. 544; Nagle v. Missouri P. R. Co., 75 Mo. 653; Rains v. St. Louis, I. M. & S. R. Co., 71 Mo. 164; Porter v. Hannibal, etc., R. Co., 71 Mo. 66; Morgan v. Durfee, 69 Mo. 469; Owen v. Brockschmidt, 54 Mo. 285; James v. Christy, 18 Mo. 162; Hickman v. Missouri P. R. Co., 22 Mo. App. 344; Bessenecker v. Sale, 8 Mo. App. 211. "In all civil actions in which damages shall be assessed by a jury for the wrong done to the person . . . and the injury complained of shall have been attended by circumstances of fraud, malice or insult, or a wanton and reckless disregard of the injured party's rights and feelings, the jury may in addition to the actual damages sustained by such party award him reasonably exemplary damages." Mills' Ann. Stats. Colo. 1891, p. 1009, sec. 1512.

[22] Rev. Stat. p. 727, sec. 2864; Mo. Rev. Stat. 1889, sec. 4425. See also Gen. Stat. Mo. sec. 2, ch. 147, p. 601; Wag. Stat. pp. 519, 520. Same in Colo. (Mills' Ann. Stat. 1891, p. 1003, sec. 1508; Gen. Stat. 1883, sec. 1030) and in N. M. (Comp. L. N. M.

[23] See Mo. Rev. Stat. 1889, sec. 2608; Jackson v. Kansas City, Ft. St. & M. R. Co., 157 Mo. 621; 58 S. W. 32; State, Cass. Co. v. Missouri P. R. Co., 149 Mo. 104; 50 S. W. 278; 15 Am. & Eng. R. Cas. N. S. 175; Lamb v. Missouri P. R. Co., 147 Mo. 171; 48 S. W. 659; 51 S. W. 81; Baker v. Kansas City, Ft. S. & M. R. Co., 147 Mo. 140; 48 S. W. 838.

Therefore an action against a railroad company for a death loss does not necessarily come within those provisions of the statute entitling the beneficiaries to recover the specific sum mentioned, but may be governed as to the measure of damages by that section which declares that they shall be "fair and just," etc. This is instanced by certain cases of employees and persons not passengers" whose death is occasioned by some defect or insufficiency in the railroad, or is due to a defective crossing, or the failure to maintain a lawful crossing and the like, or where the defendant's neglect is not a failure to perform some statutory duty. Thus it is held that for negligence in obstructing a view of a railroad track at a crossing, the full statutory sum of five thousand dollars for the death occasioned thereby of a person not a passenger cannot be awarded, but the damages must be of a sum not exceeding five thousand dollars.[24] So an instruction should not arbitrarily fix the amount of recovery at five thousand dollars where different acts of negligence causing death are specified, some of which are within that provision of the statute that the verdict shall not exceed said sum.[25] Again, where death resulted from failure to erect a signboard at a railroad crossing, the damages would be such as the jury might deem fair and just, not exceeding five thousand dollars, and not the fixed amount of five thousand dollars, since the death was not caused by negligence of the servants, etc., of the railroad company while running, conducting or managing a train of cars.[26] And where the negligence was not in running a train but in the

1897, p. 810, sec. 3213, Comp. L. 1884, sec. 2308, as am'd Laws, 1891, ch. 49). In Colorado, Missouri and New Mexico it may be shown in defense, under the statutes, that the defect or insufficiency was not due to negligence and in Missouri that the injury was not the result of unskillfulness, negligence or criminal intent. Train dispatcher is an employee under Rev. Stat. 1889, sec. 4425. Rinard v. Omaha, K. C. & E. R. Co., 164 Mo. 270; 64 S. W. 124. Death from failure to provide bells is within the statute. Lynch v. Metropolitan St. R. Co. 112 Mo. 420; 20 S. W. 642.

[24] Rappo v. St. Joseph & I. R. Co., 106 Mo. 423; 17 S. W. 487. Recovery not under Rev. Stat. sec. 4425, but under sec. 4427. Cases cited in next note below.

[25] Culbertson v. Metropolitan St. R. Co., 140 Mo. 35; 36 S. W. 834; Crumpley v. Hannibal & St. J. R. Co., 98 Mo. 34; 11 S. W. 244.

[26] King v. Missouri P. R. Co., 98 Mo. 235; 11 S. W. 563, under Mo. Rev. Stat. 1879, sec. 2123, and not under sec. 2121, known as the 2d sec. of the Damage Act.

failure to construct and maintain a lawful crossing by reason whereof a person driving a team over such public crossing was killed by a train of cars, the jury should award damages not in excess of five thousand dollars, since the right of action is not within the statutory provision giving a fixed sum as damages.[27]

§ 680. "Fair and just" damages "with reference to the necessary injury"—Actions against railroads—Employees.—Much of what has been stated in a preceding section[28] applies here although the doctrine of fellow servants is also involved. Thus in case of the death of an employee of a railroad company, the measure of damages may be a sum not exceeding the statutory limit, for it may be less, and it is error to instruct the jury to assess the damages at five thousand dollars if they find for the plaintiff.[29]

§ 681. "Fair and just" damages "with reference to the necessary injury"—Damages for jury—Instructions.—If the circumstances of the case afford a safe standard for the admeasurement of damages, it should be given to the jury and the amount to be awarded, although the pecuniary loss is incapable of mathematical ascertainment, should be left to the jury's discretion, to be assessed within the statutory limit, and their finding in this respect will not be disturbed except it be clearly the result of passion, prejudice, etc. But proper instructions should be given, especially with reference to mitigating or aggravating

[27] Crumpley v. Hannibal & St. J. R. Co., 98 Mo. 34; 11 S. W. 244.

[28] See sec. 679, herein.

[29] Flynn v. Kansas City, St. J. & C. B. R. Co., 78 Mo. 195; 10 West. 418; 47 Am. Rep. 99, under sec. 3 of the Damage Act, and Wag. Stat. sec. 4, p. 53. See Sullivan v. Missouri P. R. Co., 97 Mo. 113; 10 S. W. 852; Parsons v. Missouri P. R. Co., 94 Mo. 286; 6 S. W. 464; 12 West. 615; Holmes v. Hannibal & St. J. R. Co., 69 Mo. 536; Elliott v. St. Louis & I. M. R. Co., 67 Mo. 272. Examine Miller v. Missouri P. R. Co. (Mo.), 19 S. W. 58; Elliott v. St. Louis & I. M. R. Co., 67 Mo. 272; Proctor v. Hannibal & St. J. R. Co., 64 Mo. 112; Higgins v. Hannibal & St. J. R. Co., 36 Mo. 418; Schultz v. Pacific R. Co., 36 Mo. 13. See extended note at end of this chapter as to liability and nonliability of railroads to employees and as to fellow servants. Examine generally as to relative duties of employer and employee of electric companies as to liability and nonliability of the company including fellow servants, Joyce on Elect. Law (ed. 1900), secs. 651–679.

circumstances where there is evidence thereof.[30] But where the essential elements of the damages are given to the jury in the language of the statute, its generality will not constitute reversible error, reserving to the defendant to point out the elements limiting the damages in its own instructions.[31] The verdict will, however, be reversed, where it is so clearly inadequate in face of the instructions of the court, and the evidence as to induce the conviction that it was the result of either passion, prejudice or partiality, or that the jury have shrunk from deciding the issues submitted to them.[32]

§ 682. "Fair and just" damages "with reference to the necessary injury"—Suffering of injured person and expenses. —Where the statute makes the recovery a liquidated sum for the benefit of designated persons and not of the estate, it is a compensation for the death alone and not for pain, suffering and expenses incurred, and death.[33]

§ 683. "Fair and just" damages "with reference to the necessary injury"—Factors generally to be considered.—In determining the measure of damages under a provision which specifies that they shall be fair and just with reference to the necessary injury, they may be approximately ascertained by considering generally the age of deceased, his occupation, earnings, earning capacity, ability, health, habits, including habits of in-

[30] Parsons v. Missouri P. R. Co., 94 Mo. 286; 12 West. 615; 6 S. W. 464; McGowan v. St. Louis, O. & S. Co., 109 Mo. 518; 19 S. W. 199, rev'g 16 S. W. 236; Smith v. Wabash, St. L. & P. R. Co., 92 Mo. 360; 4 S. W. 129; Stoher v. St. Louis, I. M. & S. R. Co., 91 Mo. 509, 511; 4 S. W. 389; Nichols v. Winfrey, 79 Mo. 544; Nagle v. Missouri P. R. Co., 75 Mo. 653; Frick v. St. Louis, K. C. & N. R. Co., 75 Mo. 542; Rains v. St. Louis, I. M. & S. R. Co., 71 Mo. 164.

[31] Barth v. Kansas City El. R. Co., 142 Mo. 535; 44 S. W. 778; 10 Am. & Eng. R. Cas. N. S. 281; 3 Am. Neg. Rep. 682, per Gantt, P. J., citing Browning v. Wabash Western R. Co., 124 Mo. 55; 27 S. W. 644, aff'g 24 S. W. 731.

[32] Lee v. Publishers, George Knapp & Co., 137 Mo. 385; 38 S. W. 1107; 3 Am. Neg. Rep. 297. See *S. C.*, 155 Mo. 610; 56 S. W. 468, where subsequent verdict was sustained.

[33] Wiatz v. Chicago & A. R. Co. (U. S. C. C. W. D. Mo.), 85 Fed. 424, under Mo. Stat. sec. 4425. Action survives to personal representative. Kelley v. Union P. R. Co., 16 Colo. 455; 27 Pac. 1058; 11 Ry. & Corp. L. J. 10.

dustry or otherwise, and life expectancy.[34] It is also held that where one died from injuries received, an opinion of an expert to prove the extent and character of the injuries received may be founded upon proof of the condition, ills, pains and symptoms of deceased.[35] It is decided, however, that in case of minors the possibility of promotion through the different grades of employment is not an element of damages.[36] In addition to the general elements of damages above stated, there are other factors dependent upon the relation of deceased to those seeking recovery, as in the case of care and nurture of children, prospective benefits and the like. These will be considered in connection with the particular subject-matter to which they belong.[37]

§ 684. "Fair and just" damages "with reference to the necessary injury"—Solatium—Mental suffering not a factor.—Mental anguish, grief or sorrow suffered by reason of the loss of deceased do not constitute a ground for recovery of damages either in Colorado or Missouri,[38] although as elsewhere

[34] Jury may consider age, health and habits of life, capacity for earning a livelihood for himself and family. Hogue v. Chicago & A. R. Co. (U. S. C. C. E. D. Mo. E. D.), 32 Fed. 365, 368, per Thayer, J., to jury. Action was by wife for husband's killing at a railroad crossing. Rev. Stat. Mo. as am'd March 27, 1885; Sess. Laws, 1885, p. 87, being Stat. as to railroad crossings, sec. 807; Pierce v. Connors, 20 Colo. 178, 182; 37 Pac. 721; Orman v. Mannix, 17 Colo. 564; 30 Pac. 1037; 17 L. R. A. 602; 31 Am. St. Rep. 340; Hayes v. Williams, 17 Colo. 465, 468; 30 Pac. 352; Moffatt v. Tenney, 17 Colo. 189; 30 Pac. 348; Denver & S. P. & P. R. R. Co. v. Wilson, 12 Colo. 20; 20 Pac. 340; Kansas Pac. R. Co. v. Lundin, 3 Colo. 94; Hogue v. Chicago & A. R. Co. (U. S. C. C. E. D. Mo.), 32 Fed. 365. As to its being only necessary to charge essential elements of damage in language of statute, see Barth v. Kansas City El. Ry. Co., 142 Mo. 535; 44 S. W. 778; 10 Am. & Eng. R. Cas. N. S. 281; 3 Am. Neg. Rep. 682, per Gantt, P. J. But see Goss v. Missouri P. Ry. Co., 56 Mo. App. 614. As to necessity for specifying elements of damage in charge to jury, examine Stoher v. St. Louis, I. M. & S. R. Co., 91 Mo. 509; 4 S. W. 389; Nagel v. Missouri P. R. Co., 75 Mo. 653; Rains v. St. Louis, I. M. & S. R. Co., 71 Mo. 164.

[35] Goss v. Missouri P. R. Co., 56 Mo. App. 614. See also as to allegation of facts and circumstances of death as elements of damages, Orman v. Mannix, 17 Colo. 564; 30 Pac. 1037; 17 L. R. A. 602; 31 Am. St. Rep. 340.

[36] Colorado Coal & I. Co. v. Lamb (Colo. App.), 40 Pac. 251.

[37] The question of mitigating or aggravating circumstances and exemplary damages is considered elsewhere herein.

[38] Pierce v. Connors, 20 Colo. 178;

stated [39] the statutes of both these states provide for the consideration of aggravating circumstances and these might be such as to cause additional grief or anguish to the survivors.

§ 685. "Fair and just" damages "with reference to the necessary injury"—Loss of society of deceased.—Notwithstanding exemplary damages are recoverable under this section of the Missouri statute as to "fair and just" damages, etc., yet they are allowed under the "aggravating circumstances" clause, and the loss of society or companionship of a deceased husband does not constitute a proper element of damages in that state. The loss of companionship or society of the husband by a wife is not an element of damages in an action by her under the Missouri statute for his death from the negligence of another.[40] It may be added here that while "aggravating circumstances" attending the injury or death might be such as to cause most poignant grief or mental suffering to the survivors, it is difficult to understand how "aggravating circumstances" could affect the loss of society or companionship, since these are dependent upon the death itself and not upon the manner in which it was occasioned, nor upon the negligence occasioning it.

§ 686. Relationship, legal and actual, of deceased to beneficiaries and to others—Aid and support.—Where the measure of damages is fixed by statute by way of a specified sum as a "forfeit" or penalty, the relationship of the deceased to other

37 Pac. 721; Kansas Pac. R. Co. v. Miller, 2 Colo. 442, 465, 466; Barth v. Kansas City El. R. Co., 142 Mo. 535; 44 S. W. 778; 10 Am. & Eng. R. Cas. N. S. 281; 3 Am. Neg. Rep. 682, action for husband's death, citing Parsons v. Missouri Pac. R. Co., 94 Mo. 286; 6 S. W. 464. See Schaub v. Hannibal & St. J. R. Co., 106 Mo. 74; 16 S. W. 924; Owen v. Brockschmidt, 54 Mo. 285. As to solatium under the penalty or forfeiture section (Rev. Stat. 1889, sec. 4425; Rev. Stat. 1879, sec. 2121), see Tobin v. Missouri P. R. Co. (Mo.), 18 S. W. 996; Gen. Stat. Colo. 1883, sec. 1032; Rev. Stat. Mo. 1889, sec. 4427.

[39] Sec. 677, herein.

[40] Atchison, T. & S. F. R. Co. v. Wilson (C. C. App., 8th C. E. D. Mo.), 20 Wash. L. Rep. 56; 1 C. C. A. 26; 4 U. S. App. 25; 48 Fed. 57; Schaub v. Hannibal & St. J. R. Co., 106 Mo. 74; 16 S. W. 924; Knight v. Sattler, L. & Z. Co., 75 Mo. App. 541; 1 Mo. App. Repr. 437; Furnish v. Railroad Co., 102 Mo. 669; 15 S. W. 315. Examine Blair v. Railroad Co., 89 Mo. 335; 1 S. W. 367.

parties is inadmissible evidence to affect the amount of damages recoverable in an action against a railroad company for negligent killing.[41] But where the action comes within an enactment allowing "fair and just" damages "with reference to the necessary injury," then not only the kinship or legal relation between deceased and the plaintiff, but the actual relations between them as manifested by acts of pecuniary assistance rendered by deceased to the plaintiff, and also contrary acts may be considered in arriving at the amount of damages.[42] So evidence may be given of the relationship of a deceased son to the plaintiff, and proof of contribution to support is not necessary to justify a recovery.[43] In this connection the statutory obligation of relatives and children to aid every poor person who shall be unable to earn a livelihood in consequence of any bodily infirmity, idiocy, lunacy or other unavoidable cause, and requiring their support by the father, grandfather, mother, grandchildren, child or grandchild, brother or sister, when they are of sufficient ability, is important.[44]

§ 687. "Fair and just" damages "with reference to the necessary injury" — Reasonable expectation of pecuniary benefit.—The measure of damages is declared to be a sum equal to the net pecuniary benefit which plaintiff might reasonably have expected to receive, except for the death, although such sum is uncertain and incapable of exact measurement, and in this connection acts of pecuniary assistance should, it is as-

[41] Weller v. Chicago, M. & St. P. R. Co. (Mo.), 23 S. W. 1061, rehearing denied 25 S. W. 532.

[42] Pierce v. Connors, 20 Colo. 178, 182; 37 Pac. 721, a case of death of 7-year old child.

[43] Mollie Gibson Consol. Min. & M. Co. v. Sharp, 54 Colo. App. 321; 38 Pac. 850; Brennan v. Mollie Gibson Consol. Min. & M. Co. (U. S. C. C. D. Colo.), 44 Fed. 795. As to evidence of marriage to prove heirship in action for children's benefit, see Kansas P. R. Co. v. Miller, 2 Colo. 442. As to proof of marriage of widow and deceased, see White v. Maxey, 64 Mo. 552. As to sufficiency of complaint where one of the factors set forth was the relationship of father to deceased, see Orman v. Mannix, 17 Colo. 564; 30 Pac. 1037; 31 Am. St. Rep. 340. As to evidence that plaintiffs were parents of deceased, see Muehlhausen v. St. Louis R. Co. (Mo.), 6 West. 857. See further as to contribution to support the sections herein relating to recovery by different beneficiaries.

[44] Mills' Ann. Stat. Colo. 1891, pp. 1889, 1890; id. secs. 3338, 3389, make children first liable.

serted, be considered.[45] This reasonable expectation of pecuniary benefit applies to cases where recovery is sought for loss by death to children, parents, husband or other beneficiaries who have been deprived by the death of support or assistance or other pecuniary benefit, where the evidence or the relations, legal, moral or actual of the parties, shows a reasonable ground for such expectations.[46]

§ 688. "Fair and just" damages "with reference to the necessary injury"—Physical and financial condition or circumstances.—We have seen that the condition of dependency of her minor children upon the widow renders admissible proof of their number and ages in Missouri under the statutory clause specified in the headline to this section.[47] So the condition in life and circumstances of the deceased constitute factors in the consideration of the measure of damages under this "fair and just" enactment,[48] and this rule has been applied to the father when suing for damages for his son's death.[49] But where the mother was the beneficiary, a direct question as to her financial condition was excluded, after she had stated that she was a widow and with one other surviving child, whom she had, did all the housework, there being no servant.[50] Although in

[45] Pierce v. Connors, 20 Colo. 178, 182; 37 Pac. 721, a case of death of 7-year old child.

[46] Examine Denver & R. G. R. Co. v. Spencer (Colo.), 61 Pac. 606; 25 Colo. 9; 52 Pac. 211; 10 Am. & Eng. R. Cas. N. S. 536; Colorado Coal & I. Co. v. Lamb, 6 Colo. App. 255; 40 Pac. 251; Mollie Gibson Consol. Min. & M. Co. v. Summers, 5 Colo. App. 318; 38 Pac. 853; Mollie Gibson Consol. Min. & M. Co. v. Sharp, 5 Colo. App. 321; 38 Pac. 850; Brennan v. Mollie Gibson Consol. Min. & M. Co. (U. S. C. C. D. Colo.), 44 Fed. 795; McPherson v. St. Louis, I. M. & S. R. Co., 97 Mo. 253; 10 S. W. 846; Stoher v. St. Louis, I. M. & S. R. Co., 91 Mo. 509; 10 West. 54; 4 S. W. 389; McGowan v. St. Louis, O. & S. Co., 109 Mo. 518; 19 S. W. 199; 16 S. W. 236; Hickman v. Missouri P. R. Co., 22 Mo. App. 344; 4 West. 754; Dunn v. Cass Ave. F. G. R. Co. (Mo. App.), 3 West. 424; Hogue v. Chicago & A. R. Co. (U. S. C. C. E. D. Mo.), 32 Fed. 365. See also sections herein relating to the death of children, parents and other beneficiaries generally.

[47] See secs. 692, 693, herein.

[48] Pierce v. Connors, 20 Colo. 178, 182; 37 Pac. Rep. 721; Hogue v. Chicago & A. R. Co. (U. S. C. C. E. D. Mo.), 32 Fed. 365.

[49] Grogan v. Pope Iron & M. Co., 87 Mo. 321; 3 West. 233.

[50] Overholt v. Vieths, 93 Mo. 422; 6 S. W. 74; 12 West. 95.

determining the question of contributory negligence of plaintiff, who was seeking a recovery for her husband's killing by defendant's railroad train, the factors were considered that they were poor and lived alone, and that he was very old and infirm in mind.[51] Again, in an action by a widow for her husband's death, evidence of the ages of her children was held admissible for the reason that on her husband's death she becomes responsible for their care. In this case, however, when it was learned that the children were of age to support themselves, the testimony was abandoned for plaintiffs below, but it was not withdrawn from the jury.[52]

§ 689. "Fair and just" damages "with reference to the necessary injury"—Pecuniary circumstances of defendant.—Under this provision of the Missouri statute as to the recovery of "fair and just" damages, etc., defendant's pecuniary circumstances cannot be proven except where exemplary damages are allowable.[53]

§ 690. "Fair and just" damages "with reference to the necessary injury"—Death of husband—Probable accumulations.—In Colorado the estimated accumulations of the husband during what would have been the probable length of his life constitute the compensatory damages for his killing, in the absence of proof that his wife would not have survived him in the ordinary course of nature, and the basis of the estimation in such case is his age, occupation, habits, bodily health and ability.[54]

§ 691. "Fair and just" damages "with reference to the necessary injury"—Death of parent—Probable accumulations.—Where an action is brought by children to recover for their loss by reason of their father's killing, and certain investments passed to the former upon the latter's death, the income therefrom should be excluded in estimating the probable sav-

[51] Jackson v. Kansas City, F. T. S. & M. R. Co., 157 Mo. 621; 58 S. W. 32.

[52] Atchison, T. & S. F. R. Co. v. Wilson (U. S. C. C. A. 8th C. E. D. Mo.), 48 Fed. 57, 61, citing Letherow v. R. Co., 98 Mo. 84; 11 S. W. 310.

[53] Morgan v. Durfee, 69 Mo. 469.

[54] Hays v. Williams, 17 Colo. 465; 30 Pac. 352. See also Kansas, P. R. Co. v. Lundin, 3 Colo. 94.

ings which deceased would have accumulated had he lived.[55] And the sum which the father would have accumulated by his personal exertions and added to his estate, less his and his wife's necessary expenses, constitutes the limit of recovery by children for his death, where such children are in nowise dependent upon their father. And although the maximum sum permitted to be recovered by the statute is five thousand dollars a verdict of four thousand dollars was held excessive under the evidence, where the father, who was sixty-eight years old, had only accumulated property over and above all liabilities in the amount six thousand four hundred dollars, and his annual income, exclusive of his personal expenses, was about one thousand dollars.[56]

§ 992. "Fair and just" damages "with reference to the necessary injury"—Number and ages of minor children.—The husband or wife, if any, is primarily entitled to sue under the Missouri statute, and where a widow brings an action to recover for the loss occasioned by her husband's negligent killing, seeking her remedy under this general section as to "fair and just" damages and not under the section providing a fixed sum by way of a forfeit,[57] she may prove the number and ages of her minor children dependent upon her for support by reason of such death, such evidence being admissible upon the question of her damage.[58] Again, where the verdict was for the full statutory amount for the father's killing, the fact that the plaintiffs were four minor children was considered with other factors in determining that an instruction, although erroneous, was harmless error.[59] So where a mothor sued to recover for the death of her

[55] Denver & R. G. R. Co. v. Spencer, 25 Colo. 9; 52 Pac. 211; 10 Am. & Eng. R. Cas. N. S. 536.

[56] Denver & R. G. R. Co. v. Spencer (Mo.), 61 Pac. 606.

[57] Viz: under secs. 4426, 4427, and not under sec. 4425 of Rev. Stat. 1889 (Rev. Stat. 1879, secs. 2121-2123). See secs. 675, 676, herein.

[58] Haehl v. Wabash, etc., R. Co., 119 Mo. 325; 24 S. W. 737; O'Mellia v. Kansas City, St. J. & C. B. R. Co., 115 Mo. 205; 21 S. W. 503. Husband in this case was a railroad employee. Soeder v. St. Louis, I. M. & S. R. Co., 100 Mo. 673; 13 S. W. 714, holding that widow may testify as to number and ages of her infant children. Tetherow v. St. Joseph & D. M. R. Co., 98 Mo. 74; 11 S. W. 310. See sec. 686, herein. These cases are cited to this same point in Fisher v. Central Lead Co., 156 Mo. 479; 56 S. W. 1107, under another section of the statute.

[59] McGowan v. St. Louis, O. & S.

child, she was permitted to testify that she had one surviving child who aided her in her housework.[60]

§ 693. "Direct damages sustained"—"Wilful violation," etc., of miner's act—Number and ages of minor children, in action by widow.—Under the miner's act of Missouri a right of action accrues for direct damages sustained for loss of life occasioned by wilful violation of the act or wilful failure to comply therewith, and where a widow sues a mining company for the negligent killing of her husband, who was an employee of said company, evidence is admissible on the question of damages as to the number and ages of her minor children.[61]

§ 694. "Fair and just" damages "with reference to the necessary injury"—Funeral expenses and expenses of sickness, etc.—Funeral expenses and expenses of sickness, such as medical attendance, nursing and the like, may be recovered in an action for damages for the death of a minor child.[62] But the evidence as to the amount expended should be definite, and it is not sufficient to prove that the expenses "might amount to" a certain sum.[63]

§ 695. Death—Life expectancy—Mortality tables.—For the

Co., 109 Mo. 519; 19 S. W. 199, rev'g 16 S. W. 236.

[60] Overholt v. Vieths, 93 Mo. 422; 6 S. W. 74; 12 West. 95. This evidence went to her condition in life.

[61] Fisher v. Central Lead Co., 156 Mo. 479; 56 S. W. 1107; Rev. Stat. Mo. 1889, sec. 7074, Am'd Acts, 1891, p. 182. See sec. 688, herein. The widow may sue for her husband's death under this act without joining her children, as a separate right of action is given to those entitled in the order named in the statute. Hamman v. Central Coal & Coke Co., 156 Mo. 232; 56 S. W. 1091.

[62] That the amount of funeral expenses were $150 was considered as one of the causes for holding that a verdict of one cent damages was inadequate in Lee v. Publishers George Knapp & Co., 137 Mo. 385; 38 S. W. 1107; 1 Am. Neg. Rep. 297. See *S. C.*, 155 Mo. 610; 56 S. W. 458, where verdict of $3,500 was held not excessive. Rains v. St. Louis, I. M. & S. R. Co., 71 Mo. 164; Owen v. Brockschmidt, 54 Mo. 285; Hickman v. Missouri P. R. Co., 22 Mo. App. 344; 4 West. 754. In this case the expenses of sickness and the funeral were $200. Deceased was 18 years, 3 months old, and jury failed to allow for support of child during minority, and $2,250 was held excessive. See Waitz v. Chicago & A. R. Co. (U. S. C. C. W. D. Mo.), 85 Fed. 426; Mo. Rev. Stat. sec. 4425.

[63] Salida v. McKinna, 16 Colo. 523; 27 Pac. 810.

purpose of estimating the damages and to show the expectancy of life, properly identified mortality tables are admissible in evidence in Missouri.[64] And in that state the "American Experience Table" is recognized by statute as a standard mortality table and is therefore admissible in evidence in an action to recover a death loss.[65]

§ 696. "Fair and just" damages "with reference to the necessary injury"—Nominal damages.—In Missouri it is held that where an infant is of very tender years, the verdict should not be limited to nominal damages for loss of a deceased parent's care.[66] So an instruction is properly refused, which limits the recovery for the death of a son to nominal damages, where there is evidence of the age and the circumstances and of the condition in life of the plaintiff.[67] And where a fireman was killed through the negligence of a railroad company's agent, and it appeared that he was always at work and able to fulfill the duties of his position, that he was only thirty-nine years old and the head of a family, it was held that more than nominal damages could be recovered.[68]

§ 697. "Fair and just" damages "with reference to the necessary injury"—"Direct damages sustained"—Death of husband.—In an action by a widow to recover damages for her husband's death under the "fair and just" damages enactment which has "reference to the necessary injury" and also to mitigating or aggravating circumstances,[69] the Missouri court has approved a charge to the jury which gives the essential elements of damage in the language of the statute, and also an instruction that the jury should assess the damages at such sum as would compensate her for the death of her husband, ex-

[64] O'Melia v. Kansas City, St. J. & C. B. R. Co., 115 Mo. 205; 21 S. W. 503. Action by widow for death of husband.

[65] Boettger v. Scherpe & K. Architectural I. Co., 136 Mo. 531; 38 S. W. 298, under Mo. Rev. Stat. 1899, sec. 5841. Action here was for the death of plaintiff's husband.

[66] Stoher v. St. Louis, I. M. & S. R. Co., 91 Mo. 509; 10 West. 54; 4 S. W. 389. Infant was 11 months old.

[67] Grogan v. Pope Iron & M. Co., 87 Mo. 321; 3 West. 233.

[68] And that $3,500 was not excessive. Smith v. Wabash, St. L. & P. R. Co., 92 Mo. 364; 8 West. 729; 4 S. W. 129.

[69] See sec. 677, herein.

cluding an allowance for mental anguish, grief and sorrow. But the compensation should not be restricted to the actual present money loss sustained by her.[70] And in an earlier case an instruction was held not erroneous, which was in the statutory language, there being no aggravating circumstances to justify more than actual damages.[71] But it is error to charge the jury to allow the widow such a sum as would equal the probable earnings of deceased during his probable length of life,[72] and where an action was brought by a widow under the miner's act to recover for loss occasioned by the death of her husband, a mine employee, it was held that evidence as to his earnings should be confined to the time, and that proof of what he had earned the year before his death was inadmissible.[73] Again, one of the factors to be considered in this connection is the loss of that support which the widow would have received had her husband lived, and she is entitled to compensation therefor.[74]

§ 698. "Fair and just" damages "with reference to the necessary injury"—Death of parent.—This provision as to "fair and just" damages necessitates, in case of a parent's killing, the limitation of the recovery to the pecuniary loss contemplated by the statute.[75] But the question of dependency of

[70] Barth v. Kansas City El. R. Co., 142 Mo. 535; 44 S. W. 778; 10 Am. & Eng. R. Cas. N. S. 281; 3 Am. Neg. Rep. 682. See also Browning v. Wabash Western R. Co., 124 Mo. 55; 24 S. W. 731, aff'd 27 S. W. 644; McGowan v. St. Louis, Ore. & S. R. Co., 109 Mo. 519; 19 S. W. 199; Tetherow v. St. Joseph R. Co., 98 Mo. 74. Examine McGowan v. St. Louis, Ore. & S. Co., 109 Mo. 518; 19 S. W. 199, rev'g 16 S. W. 236; Goss v. Missouri P. R. Co., 50 Mo. App. 614. As to mental suffering, etc., see sec. 684, herein; as to loss of society, etc., see sec. 685, herein; as to number and ages of minor children and financial, etc., condition, see sec. 688, herein.

[71] Nichols v. Winfrey, 90 Mo. 403; 7 West. 150.

[72] McKinley v. Sadtler L. & M. Co., 80 Mo. App. 93; 2 Mo. App. R. 532, under Mo. Rev. Stat. 1889, sec. 4427; McKinley v. Sadtler L. & Z. Co., 75 Mo. App. 541; 1 Mo. App. Rep. 437, dist'g McGowan v. St. Louis, Ore. & S. R. Co., 109 Mo. 519; 19 S. W. 199.

[73] Hamman v. Central Coal & C. Co., 156 Mo. 232; 56 S. W. 1091, under Rev. Stat. 1889, sec. 7074, as Am'd Acts, 1891, p. 182, providing for recovery of "direct damages sustained," etc.

[74] Nichols v. Winfrey, 90 Mo. 403; 7 West. 50.

[75] Denver & R. G. R. Co. v. Spencer, 25 Colo. 9; 52 Pac. 211; 10 Am. & Eng. R. Cas. N. S. 536. "Heir or heirs" in Colo. Gen. Law, 1877, p. 343, means "child or children."

children for support would affect the measure of damages with reference to probable accumulations of the deceased and the interest of children therein, and also the factors of income from investments and of inheritance of investments would operate as a limitation upon the recovery.[76] The statutes of both Colorado and Missouri further provide for the consideration of mitigating or aggravating circumstances, although a different construction obtains in each state as to the effect of this provision in relation to the measure of damages.[77] Again, the fact that children are entitled to a certain degree of care, maintenance, training and the like, is a necessary element of damages,[78] while the age of deceased, his earnings or income, his habits of saving, his needed expenditures and those of his wife, and his expectancy of life, are all elements of the pecuniary loss sustained.[79] And in view of these factors it would seem to necessarily follow that deceased's condition in life and the condition in life of his children, and the former's habits of living, should constitute a legitimate subject of inquiry.[80] In Missouri, only minor children can recover damages for a parent's death, and in this state also as well as in Colorado the first point to determine is whether the action accrues under the section relating to a "forfeit" or under that providing for "fair and just" damages, or, if in Missouri, under the "direct damages" enactment.[81] If the recovery is sought under the "fair and just" provision, the proper elements of damages are not given in a charge to the jury that if they find for plaintiffs "they will assess the damages in such sum as they believe will compensate them for the pecuniary injury sustained by them in the death, not in excess of the sum of five thousand dollars," and such instruction is erroneous. But where the facts as to the number of surviving minor children, decedent's age and the amount of his earnings, so justify, as in this case, an instruction will be held to be harmless error even though it

Hindry v. Holt, 24 Colo. 464; 51 Pac. 1002; 39 L. R. A. 351.

[76] See sec. 690, herein.

[77] See sec. 678, herein.

[78] See sec. 699, herein.

[79] See cases under note next following.

[80] Examine Denver & R. G. R. Co. v. Spencer, 61 Pac. 606; Pierce v. Connors, 20 Colo. 178, 182; 37 Pac. 721, wherein the general elements of damages are stated, although the action was for a child's killing. Kansas P. R. Co. v. Lundin, 3 Colo. 94.

[81] See secs. 675 et seq., 693, herein.

thus omits essential elements of damages and the jury have awarded the maximum statutory sum.[82] Again, the loss of the deceased father's support during minority is the important factor in awarding compensation to minors, and proof of the amount of his earnings is unnecessary to enable them to recover the full statutory allowance.[83] Nor need the damages to such children be specially pleaded.[84] And for loss of a parent's care the sum to be awarded should not be merely nominal in case of an infant of very tender years.[85]

§ 699. "Fair and just" damages "with reference to the necessary injury"—Support, care, etc., of children—Prospective damages.—Where the recovery is for the benefit of minor children, the fact should be considered that they are entitled to support during minority, and to their father's services for that period in their care and training, so that for this prospective pecuniary loss sustained by them until majority by their father's killing, they may recover a reasonable compensation, for these things have a pecuniary value,[86] although it seems that the fact will be considered that children are in no manner dependent upon their father.[87]

§ 700. Death of children—The Colorado and Missouri statutes—Damages—Generally.—A right of action exists in Colorado in favor of a parent or parents where the deceased

[82] McGowan v. St. Louis, Ore. & S. Co., 109 Mo. 518; 19 S. W. 199, rev'g 16 S. W. 236. Deceased was 40 years old, earned $3 a day and left four minor children. See Goss v. Missouri P. R. Co., 50 Mo. App. 614. Action was by minor daughter for father's death. But examine Barth v. Kansas City El. R. Co., 142 Mo. 535; 44 S. W. 778; 10 Am. & Eng. R. Cas. N. S. 281; 3 Am. Neg. Rep. 682, and cases cited.

[83] McPherson v. St. Louis, I. M. & S. R. Co., 97 Mo. 253; 10 S. W. 846. Father was employee killed on railroad. See Stoher v. St. Louis, I. M. & S. R. Co., 91 Mo. 509; 4 S. W. 389; 10 West. 54.

[84] Ellingson v. Chicago & A. R. Co., 1 Mo. App. Rep. 298.

[85] Stoher v. St. Louis, I. M. & S. R. Co., 91 Mo. 509; 4 S. W. 389; 10 West. 54. Infant in this case was 11 months old.

[86] See McPherson v. St. L., I. M. & S. R. Co., 97 Mo. 253; 10 S. W. 846; Stoher v. St. Louis, I. M. & S. R. Co., 91 Mo. 509; 4 S. W. 389; 10 West. 54.

[87] Denver & R. G. R. Co. v. Spencer (Colo. 1900), 61 Pac. 606; 25 Colo. 9; 52 Pac. 211; 10 Am. & Eng. R. Cas. N. S. 536.

was a "minor or unmarried,"[88] and it is sufficient to aver a sole heirship and sole authority to sue on the part of a mother seeking recovery for a son's death without alleging that the deceased was unmarried and had no children.[89] Again, actions have been brought and a recovery had for the death of adult children, at least to the extent of substantial damages.[90] In addition, the right to sue for an employee's death has been enlarged and extended by statute,[91] and an obligation further exists by statute to support indigent parents.[92] In Missouri the statute differs from the Colorado enactment in that the right of action is given to the parent or parents where the deceased was a "minor and unmarried," and adopted children are also included.[93] But the father or mother can maintain an action for the death of a child only when it is a minor,[94] and even this restricted right is confined to cases where the deceased minor left no widow or children surviving him.[95] Again, a right to recover

[88] Colo. Gen. Stat. 1883, secs. 1030–1033; Colo. Gen. Laws, 1877, p. 343. See Pierce v. Connors, 20 Colo. 178; 37 Pac. 721; Brennan v. Mollie Gibson Consol. Min. & M. Co. (U. S. C. C. D. Colo.), 44 Fed. 795. As to mother's right to sue, see Colo. Code Civ. Proc. sec. 9.

[89] Brennan v. Mollie Gibson Consol. Min. & M. Co. (U. S. C. C. D. Colo.), 44 Fed. 795. An action can in certain cases be brought by the heirs under the Colo. stat.

[90] Denver, S. P. & P. R. Co. v. Wilson, 12 Colo. 20; 20 Pac. 340; 2 Den. Leg. Notes, 73; Mollie Gibson Consol. Min. & M. Co. v. Sharp, 5 Colo. App. 321; 38 Pac. 850.

[91] Colo. Employer's Liability Act of 1893 (Session Laws, 1893, ch. 77), given in Reno's Employers' Liability Acts (ed. 1896), p. 373. This act gives to those entitled to sue and recover for damages the same right of compensation and remedy as if the employee had not been an employee of or in the service of the employer. See Colo. Coal Mining Act of 1885.

[92] Gen. Stat. Colo. secs. 2529, 2530.

[93] Mo. Rev. Stat. 1889, secs. 4425–4427. See Mo. Rev. Stat. 1879, secs. 2121–2123. Mother where father is dead may maintain action for death of son under sec. 4426. Lee v. Publishers George Knapp & Co., 155 Mo. 610; 56 S. W. 458. Mother of illegitimate child need not join husband under sec. 4425. Marshall v. Wabash R. Co. (Mo.), 25 S. W. 179. See Marshall v. Wabash R. Co., 46 Fed. 269, to point that mother of such child cannot sue.

[94] Parsons v. Missouri P. R. Co., 94 Mo. 286; 12 West. 615; 6 S. W. 464. As to evidence that plaintiffs were parents of deceased child, see Muehlhausen v. St. Louis R. Co. (Mo.), 6 West. 857.

[95] McIntosh v. Missouri P. R. Co., 103 Mo. 131; 15 S. W. 80, under Rev. Stat. 1879, sec. 2121. See Baird v. Citizens R. Co., 146 Mo. 265; 48 S. W. 78, under Rev. Stat. 1889, sec. 4425; Czezewzka v. Benton Bellefontaine R. Co. (Mo.), 25 S. W. 911; Sparks v. Kansas City, S. & M. R. Co., 31 Mo. App. 111, under Stat.

the "direct damages sustained" exists under the miner's act in favor of lineal heirs and those dependent for support upon deceased during his life,[96] and irrespective of any decision upholding or overruling such contention, it might with reason be asserted that this enactment introduces the element of support or dependency as a factor in estimating damages, involving also the question of the extent of such dependency or support and the corresponding loss. In addition to what is above stated, it may be added that the element of wilfulness on the part of the defendant is expressly a factor under this last mentioned statute. As we have elsewhere stated, there exist in both Colorado and Missouri a "fair and just" damages enactment having reference to the mitigating and aggravating circumstances, and limiting the amount of recovery, and also a statute in which the amount of damages is fixed at a specified sum as a "forfeit,"[97] but under both these provisions the same parties are entitled to sue for a child's death. The importance of these various statutory provisions and the construction thereof is obvious in determining not only the value of a decision of these states in other jurisdictions, but also in enabling one to understand the reasons underlying what might otherwise seem conflicting decisions, while the difficulty in attempting to deduce any general governing rule applicable in all the states becomes at once apparent.

§ 701. "Shall forfeit and pay"—"The sum of"—Death of children.—It is sufficient for the parent to establish a right of recovery for the negligent killing of his child to entitle him to the full sum fixed as a "forfeit" under the statute providing

1879, sec. 2122; Dulaney v. Missouri P. R. Co. (Mo. App.), 5 West. 33; Barker v. Hannibal & St. J. R. Co., 91 Mo. 86; 14 S. W. 280.

[96] Rev. St. Mo. 1889, sec. 7074. The act provides that the right of action shall accrue to (among others) the lineal heirs, or to any person or persons who were before such loss of life dependent for support upon the person or persons so killed, for a like recovery of damages (any direct damages sustained) sustained by reason of such loss of life or lives. This act as amended by Acts, 1891, p. 182, gives separate rights of action to persons in order named. Hamman v. Central Coal & Coke Co., 156 Mo. 232; 56 S. W. 1091. And the act increases the damages from $5,000 to $10,000 as the limit of recovery, and is constitutional. Id.

[97] See Philpott v. Missouri P R. Co., 85 Mo. 164.

therefor,[98] and it seems that an action can be brought under this statutory provision to recover damages for the death of a child even though emancipated.[99] So the fixed sum of five thousand dollars can be recovered by the parents for a minor child killed by negligence in running a locomotive.[100]

§ 702. "Fair and just" damages "with reference to the necessary injury"—Death of children.—Where an action is brought to recover damages for a minor child's death, it is the duty of the jury when they have found that it was occasioned by defendant's negligence to ascertain the extent of the parent's injury and award a reasonable compensation therefor, and they should assess the damages at such sum as they believe from the evidence would be a fair compensation for the loss of the services of the minor from the time of his death until he would arrive at the age of twenty-one, less the cost of his support, not exceeding the statutory sum limited as damages, and this includes the net profit to the parents from the minor's earnings.[1] The rule has also been generally stated thus: the measure of damages in favor of a father for his minor son's death is such an amount of money, not in excess of the statutory limit, as the jury may deem fair and just, with reference to the necessary injury resulting from the death to the surviving parties entitled to sue, and also having regard to the mitigating and aggravating circumstances attending the wrongful act.[2] But the factors which

[98] Mangan v. Foley, 33 Mo. App. 250, under Rev. Stat. 1879, sec. 2121.

[99] Philpott v. Missouri P. R. Co., 85 Mo. 164.

[100] Tobin v. Missouri P. R. Co. (Mo.), 18 S. W. 996.

[1] Lee v. Publishers George Knapp & Co., 137 Mo. 385; 38 S. W. 1107; 1 Am. Neg. Rep. 297, per Robinson, J., a case where a boy 12 years old was killed in an elevator. Damages of one cent were held inadequate. But in this same case (155 Mo. 610; 56 S. W. 458), a verdict of $3,500 was given in favor of the mother, which the court refused to set aside as excessive. Where husband and wife bring suit for damages for a son's death, they are competent witnesses. Bell v. Hannibal & St. J. R. Co., 86 Mo. 599; 4 West. 391. As to medical and funeral expenses and the like, see sec. 694 herein. That action lies only for death of a minor child in this state, see secs. 700–703, herein.

[2] Hickman v. Missouri P. R. Co., 22 Mo. App. 344; 4 West. 754, under Rev. Stat. 1879, sec. 2123. That it is sufficient to charge the essential elements in the language of the statute, see Barth v. Kansas City El. R. Co., 142 Mo. 535; 44 S. W. 778; 10 Am. & Eng. R. Cas. N. S. 281; 3 Am. Neg. Rep. 682, per Gantt, P. J.

enter into the estimate of the sum to be assessed and which are for the most part considered without discussion are age,[3] sex,[4] occupation,[5] earnings,[6] ability and health, as where a deceased boy had been strong, robust and attentive to business,[7] and the circumstances and conditions in life of the plaintiff,[8] although the extent of this inquiry seems to be limited.[9] The full value of the deceased child's services during his minority less the expense of his support and maintenance should also be given, but not in excess of the sum limited as damages by the statute.[10] So where deceased was within two years and eight months of majority, the recovery was held limited to a reasonable estimate of his earnings, less expenses during such period.[11] But the expense of supporting a minor child subsequent to the injury should not be deducted.[12] Again, although the value of the deceased child's services during minority may be recovered,[13] yet it has been held that a father seeking such damages must allege and prove that the child was his servant, and must give evidence tending to show their probable value during minority from the time of the

[3] Franke v. St. Louis (Mo.), 19 S. W. 938; Parsons v. Missouri P. R. Co., 94 Mo. 286; 6 S. W. 464; 12 West. 615; Overholt v. Vieths, 93 Mo. 422; 6 S. W. 74; 12 West. 95; Grogan v. Pope Iron & Met. Co., 87 Mo. 321; 3 West. 233; Nagle v. Missouri P. R. Co., 75 Mo. 653; Hickman v. Missouri P. R. Co., 22 Mo. App. 344; 4 West. 754.

[4] See Overholt v. Vieths, 93 Mo. 422; 6 S. W. 74; 12 West. 95. The sex is generally considered without any discussion and even without any stated rule.

[5] Parsons v. Missouri P. R. Co., 94 Mo. 286; 6 S. W. 464; 12 West. 615. Deceased was a brakeman. Hickman v. Missouri P. R. Co., 22 Mo. App. 344; 4 West. 754.

[6] Franke v. St. Louis (Mo.), 19 S. W. 938; Parsons v. Missouri P. R. Co., 94 Mo. 286; 6 S. W. 464; 12 West. 615; Hickman v. Missouri P. R. Co., 22 Mo. App. 344; 4 West. 754.

[7] Franke v. St. Louis (Mo.), 19 S. W. 938. Boy here was injured while passing on sidewalk by stone falling from wall of building burned three weeks before.

[8] Grogan v. Pope Iron & Met. Co., 87 Mo. 321; 3 West. 233; Overholt v. Vieths, 93 Mo. 422; 6 S. W. 74; 12 West. 95.

[9] Overholt v. Vieths, 93 Mo. 422; 6 S. W. 74; 12 West. 95. In this case a verdict of ten dollars for the death of a boy 8 years old was sustained, as the defendant had not appealed and a verdict for the latter would have been justified by the evidence.

[10] Hickman v. Missouri P. R. Co., 22 Mo. App. 344; 4 West. 754, under Rev. Stat. 1879, sec. 2123.

[11] Parsons v. Missouri P. R. Co., 94 Mo. 286; 6 S. W. 464; 12 West. 615.

[12] Schmitz v. St. Louis, etc., R. Co., 46 Mo. App. 380.

[13] Rains v. St. Louis, I. M. & S. R. Co., 71 Mo. 164.

injury.[14] And recovery may be had even though there is no evidence of the amount of earnings of deceased.[15] But it cannot be shown in defense that the child's services were of no value.[16] It may be added in conclusion, having reference to the cases cited under this section as well as to decisions under pecuniary injury statutes, that, inasmuch as the difficulty of proving the "necessary" or "pecuniary" injury is so clearly apparent, the measure of damages cannot be limited to the actual, "necessary" or "pecuniary" loss proven, although the recovery is confined to a fair and reasonable compensation for loss occasioned by a child's death, having in view all the circumstances of mitigation or aggravation as provided for under the statute.

§ 703. "Fair and just" damages "with reference to the necessary injury"—Death of children—Employees.—In case of the death of a mining employee who was plaintiff's son, evidence is admissible of the amount of his weekly contributions for a considerable time to her support, and this shows a sufficient pecuniary injury to warrant a recovery.[17] And for the killing of an employee in a coal mine a recovery may be had, and a sufficient basis is laid therefor by proof of decedent's contributions to his parents' support, the amount of his earnings and the ages of the respective parties.[18] But evidence of contribution to support is unnecessary in order to recover for the negligent killing of a son who was a mining employee, where there is proof of the relationship of plaintiff and deceased and of their relative ages and habits.[19] Nor need a mother have been dependent upon her son to enable her to recover damages.[20] And where proof is

[14] Dunn v. Cass Ave. F. G. R. Co. (Mo. App.), 3 West. 424. See Grogan v. Pope Iron & M. Co. 87 Mo. 321; Nagel v. Missouri P. R. Co., 75 Mo. 653.

[15] Parsons v. Missouri P. R. Co., 94 Mo. 286; 6 S. W. 464; 12 West. 615.

[16] Foppiano v. Baker, 3 Mo. App. 559.

[17] Mollie Gibson Min. & M. Co. v. Summers, 5 Colo. App. 318; 38 Pac. 853.

[18] Colorado Coal & I. Co. v. Lamb, 6 Colo. App. 255; 40 Pac. 251. In this case it was also held that a mine boss engaged in directing and making repairs and with no authority other than that given by the coal mining act of 1885, was a fellow servant of a mine employee.

[19] Mollie Gibson Consol. Min. & M. Co. v. Sharp, 5 Colo. App. 321; 38 Pac. 850.

[20] Brennan v. Mollie Gibson Consol. Min. & M. Co. (U. S. C. C. D. Colo.), 44 Fed. 795.

received without objection concerning the wages of deceased, the failure to allege that element of damages does not constitute cause for reversal.[21] Again, in an action for the death of a minor child, evidence is admissible as to the value of the service of such minor, although the recovery is not limited by that value, and it was also stated as a general rule,[22] that proof of acts of pecuniary assistance rendered, as well as of contrary acts, and of deceased's disposition to aid plaintiff and his condition in life could, with other factors, be considered in arriving at the net pecuniary benefit for the loss of life.[23] So where a minor employee was killed through negligence of his employer, a complaint was held sufficient to justify the award of such damages as are naturally and usually occasioned by death, where the averments stated deceased's employment by defendants, his age, occupation, amount of his daily earnings, the facts and circumstances of his death as the result of defendant's negligence, and also that plaintiff was the father of deceased, and the allegation of special damages is unnecessary.[24] And where a railroad fireman was killed through the alleged negligence of a railroad company, it seems that substantial damages were held recoverable by the parents, even though the deceased was an adult.[25] Again, the question of contribution to support with relation to its continuance after majority is to be considered by the jury.[26] The general elements of damages, therefore, as deduced from the above cases, are the ages and habits of the respective parties, occupation, earnings, earning capacity, contributions to support, although proof of dependency seems unnecessary, and the value of the deceased's services, but the damages are not limited thereby. In addition,

[21] Mollie Gibson Consol. Min. & M. Co. v. Sharp, 5 Colo. App. 321; 38 Pac. 850.

[22] Under Colo. Act, 1877.

[23] Pierce v. Connors, 20 Colo. 178, 182; 37 Pac. 721. Deceased was a 7-year old daughter killed by runaway horses negligently left unhitched and uncared for on a public street.

[24] Orman v. Mannix, 17 Colo. 564; 17 L. R. A. 602; 30 Pac. 1037; 31 Am. St. Rep. 340. Deceased in this case was a boy 14 or 15 years old, subject to the orders of a gang boss who negligently ordered him to run and throw away an ignited stick of giant powder, such act not being within the scope of the duties of the boy, but within those of the boss.

[25] Denver, S. P. & P. R. Co. v. Wilson, 12 Colo. 20; 20 Pac. 340; 2 Den. Leg. News, 73.

[26] Colorado Coal & I. Co. v. Lamb, 6 Colo. App. 255; 40 Pac. 251.

it would seem that the condition in life of deceased and perhaps of the parents, and the sex and mental ability of the child, should be considered, also the expense of his support and maintenance during minority, to reduce the "necessary injury" to a net sum. It is also intimated that the contribution to support after reaching majority constitutes a factor where there is evidence of an intent to continue such contributions.[27]

§ 704. Death—Mitigation of damages—Defenses—Colorado and Missouri statutes—Generally.—As we have stated elsewhere, there are different statutes in Colorado and Missouri under which a right of action accrues for the killing of a person.[28] That provision in both states which fixes the damages at a specified sum as a "forfeit" or penalty,[29] embodies the elements of "negligence, unskillfulness or criminal intent," and includes death occasioned by "defects or insufficiency" in railroad cars and other public conveyances. But in Colorado and Missouri it may be shown under the statute that the defect or insufficiency was not a negligent one, and in Missouri that the injury received was not the result of unskillfulness, negligence or criminal intent. Again, those sections in both states[30] which provide for "fair and just" damages "with reference to the necessary injury," have relation to a death "caused by a wrongful act, neglect or default," and provide also for the consideration of the "mitigating or aggravating circumstances attending" such "wrongful act, neglect or default." Again, in Colorado, there is the Employers' Liability Act,[31] giving the same right of compensation and remedy as if the employee had not been an employee,[32] and in Missouri the miners' act[33] embodies a wilful violation thereof or a wilful failure to comply with any of its provisions, and authorizes the recovery of the

[27] See Pierce v. Connors, 20 Colo. 178, 182; 37 Pac. 721, per Colorado Coal & I. Co. v. Lamb, 6 Colo. App. 255; 40 Pac. 251. As to medical and funeral expenses and the like, see sec. 694 herein.

[28] See secs. 675 et seq., herein.

[29] Colo. Gen. Stat. 1883, sec. 1030; Mo. Rev. Stat. 1899, sec. 4425.

[30] Colo. Gen. Stat. 1883, secs. 1031, 1032, Mo. Rev. Stat. 1889, secs. 4426, 4427.

[31] Act, 1893 (Session Laws, 1893, ch. 77).

[32] As to right of action and fellow servants in Missouri, see Sullivan v. Missouri P. R. Co., 97 Mo. 113; 10 S. W. 852.

[33] Rev. Stat. 1889, secs. 7074, as Am'd Act, 1891, p. 182.

direct damages sustained. There exists, therefore, under these statutes, a special provision allowing the consideration of mitigating circumstances attending the wrongful act, neglect or default, and other provisions covering the elements of "wilfulness," and also of "negligence, unskillfulness or criminal intent," while another enactment affects the question of fellow servants. The question of contributory negligence is also involved under all the statutes, while the factors above noted all enter into the consideration of damages and may preclude any recovery whatsoever.[34]

§ 705. Death—Mitigation of damages—Defenses—Insurance.—Under that section of the Missouri statute, which provides that certain common carriers shall "forfeit and pay" a specified sum where death is occasioned by negligence, etc., acts, the amount of damages is expressly fixed at the sum named and conferred upon the designated parties, and a defense is irrelevant and immaterial which alleges that insurance money was received by plaintiff upon her husband's death. Such money does not enure to the benefit of defendant, nor should it reduce pro tanto the amount of damages recoverable.[35]

§ 706. Death—Mitigation of damages—Defenses—Colorado and Missouri—Continued—Contributory negligence.—Having in view what has been stated under the preceding section, it might perhaps be fairly and reasonably asserted that, outside of any judicial construction the words "mitigating . . . circumstances attending such wrongful act," etc., are exclusive. But however this may be, it has been held that a charge to the jury based upon such circumstances is not warranted by evidence of contributory negligence.[36] But where it is claimed that notwithstanding deceased's contributory negligence in placing himself in a perilous situation, the servants of the defendant railroad company failed to exercise ordinary care to

[34] As to fellow servants, see extended note at end of this chapter.

[35] Carroll v. Missouri P. R. Co., 88 Mo. 239; 3 West. 839. Action was under Mo. Rev. Stat. 1879, sec. 2121 (Rev. Stat. 1889, sec. 4425). See also Clune v. Bristine (U. S. C. C. D. Colo.), 36 C. C. A. 450; 94 Fed. 745; 6 Am. Neg. Rep. 416.

[36] McGowan v. St. Louis, Ore. & S. Co. (Mo.), 16 S. W. 236. See 109 Mo. 518.

avoid injuring deceased after they saw his danger, such theory must be presented by the pleadings to authorize any recovery.[37] And the fact that one was a trespasser will not excuse his negligent killing by being struck by a railroad train.[38] And the contributory negligence of the plaintiff who was seeking a recovery for the killing of her husband will be considered, as will also the contributory negligence of the deceased.[39] So the contributory negligence of a passenger will bar a recovery for his death, under the provision fixing a certain sum as a "forfeit" for "negligence, unskillfulness or criminal intent."[40] And the contributory negligence or imputed negligence of parents may be considered in defense.[41] In this connection it may also be stated

[37] McManamee v. Missouri P. R. Co., 135 Mo. 440; 37 S. W. 119; 5 Am. & Eng. R. Cas. N. S. 474. Although the mode in which defects in an elevator or the negligence of defendants occasioned death need not be alleged. Lee v. Publishers George Knapp & Co., 155 Mo. 610; 56 S. W. 458. A case of death of plaintiff's minor son caused by defective elevator.

[38] Jackson v. Kansas City, Ft. S. & M. R. Co., 157 Mo. 621; 58 S. W. 32, citing several Missouri cases.

[39] Jackson v. Kansas City, Ft. S. & M. R. Co., 157 Mo. 621; 58 S. W. 32. In this case the action was for the death of plaintiff's husband who was killed by a railroad train running a rate of speed prohibited by ordinance. Plaintiff and her husband were poor and lived alone. He was very old and infirm in mind and had wandered away from home and gone upon the railroad track, while his wife was temporarily absent. It was held that she was not guilty of negligence contributory to her husband's death. The contributory negligence of deceased was also considered in this case, having in view his mental condition. Precipitating one's self before a train to save a horse and wagon from collision is contributory negligence which bars a recovery for death of such person so caused, especially where the horse was left unfastened and unguarded on the street near the track and the horse ran away and this was in consequence thereof. McManamee v. Missouri P. R. Co., 135 Mo. 440; 37 S. W. 119; 5 Am. & Eng. R. Cas. N. S. 474. And even though the company was negligent, yet if one is only a few feet distant from a street car running 7 miles an hour and attempts to cross the track and is killed, he is guilty of contributory negligence and damages cannot be recovered for his death. Watson v. Mound City St. R. Co., 135 Mo. 246; 34 S. W. 573; 3 Am. & Eng. R. Cas. N. S. 385. Deceased, a boy 17 years old, was held guilty of contributory negligence in picking up a live electric wire where the wire was not insulated and he was aware of the danger but not of the extent thereof. Frauenthal v. Laclede Gaslight Co., 67 Mo. App. 1,

[40] Higgins v. Hannibal & St. J. R. Co., 36 Mo. 418. Brakeman was riding in a baggage car. He was held not a passenger although the principle in the text was asserted.

[41] Reilly v. Hannibal & St. J. R.

that contributory negligence is no defense where the injury is wilful.[42] But under the express provision as to "wilful violation" thereof or "wilful failure" to comply therewith contained in the miner's act of Missouri,[43] it is held that assumption of risk like contributory negligence is an affirmative defense under said statute.[44] It seems, however, that an action under this enactment comes within the rule expressed in another statutory provision limiting the action to those cases where the party injured could have sued.[45] Again, if mitigating circumstances exist, they are a matter concerning which proper instructions should be given the jury.[46]

§ 707. Death—Mitigation of damages—Defenses—Remarriage.—Where the father of an unmarried minor child is dead, the right of a mother to recover damages for such child's killing, under a statute which permits a recovery by the father or mother,

Co., 94 Mo. 600; 7 S. W. 407; Donahoe v. Wabash, St. L. & P. R. Co., 83 Mo. 543. See 1 Shearman & Redfield on Neg. (ed. 1898) secs. 70 et seq.

[42] 1 Shearman & Redfield on Neg. (ed. 1898) sec. 64, citing Hector Min. Co. v. Robertson, 22 Colo. 491, and numerous other cases. This case (also reported 45 Pac. 406; 4 Am. & Eng. Corp. Cas. N. S. 349) held that a trespasser could recover for a wilful, wanton or malicious personal injury, and where carelessness was so gross as to amount to wilful misconduct, contributory negligence would not defeat a recovery. See also as supporting the text, Gray v. McDonald, 104 Mo. 303; 16 S. W. 398; 28 Mo. App. 477; Louisville & N. R. Co. v. Brice, 84 Ky. 298; 1 S. W. 483; Jones, Admr. v. Louisville & N. R. Co., 82 Ky. 610; Central R. & Bkg. Co. v. Denson, 84 Ga. 774; 11 S. E. 1039; 8 Ry. & Corp. L. J. 425.

[43] Mo. Rev. Stat. 1889, sec. 7074, Am'd Acts, 1891, p. 182.

[44] Fisher v. Central Lead Co., 156 Mo. 479; 56 S. W. 1107, citing numerous Missouri cases. So assumption of risk by an experienced miner may be considered and left to the jury. Hamman v. Central Coal & C. Co., 156 Mo. 232; 56 S. W. 1091, citing several Missouri cases. As to mean of "wilful" in declaration under similar act, see Odin Coal Co. v. Denman, 185 Ill. 413; 57 N. E. 192, aff'g 84 Ill. App. 196, under 2 Starr & C. Ann. Stat. pp. 2721, 2723, 2728; ch. 93, secs. 6, 8, 14. As to contributory negligence of mine employees, see Lenk v. Kansas & T. Coal Co., 80 Mo. App. 374; 2 Mo. App. Rep. 589; Ashland Coal I. & R. Co. v. Wallace, 101 Ky. 626; 19 Ky. L. Rep. 857; 43 S. W. 207; 79 Ky. L. Rep. 849; 42 S. W. 744, under Ky. Stat. sec. 2732, embodying the elements of intentional or wilful neglect.

[45] Spiva v. Osage Coal & M. Co., 88 Mo. 68.

[46] Rains v. St. Louis, I. M. & S. R. Co., 71 Mo. 164.

or the survivor of them, is not affected by the mother's remarriage to one who has assumed the obligations of a natural father to his stepchild.[47]

§ 708. Death—Defenses—Acquittal of murder—Avoiding conflict—Self-defense—Exemplary damages.—The right to maintain a civil action for damages for death caused by wrongful act does not depend upon defendant's guilt of murder in the first degree.[48] So a civil action for damages for the killing of a person is not barred by an acquittal, upon an indictment for murder, but it may be maintained, nevertheless, against the one indicted, or the person who aided and abetted him, or who incited or encouraged him in committing the wrongful act which resulted in death. Nor is it a defense to the civil action that deceased was in fault in not avoiding the encounter, and exemplary damages may be awarded in such an action.[49] In considering the defense of provoking or failing to avoid a conflict, or the question of self-defense, it would seem of importance that the statutes of both Colorado and Missouri provide that the wrongful act, neglect or default must be such as would have entitled the injured party to have maintained an action had death not ensued.

§ 709. Death—Defenses—Mitigation of damages—Improper relations with wife.—It cannot be shown in an action to recover compensatory damages for the homicide of a husband, either in justification or to reduce the damages, that decedent had sustained improper relations with defendant's wife, and

[47] Hennessy v. Bavarian Brew. Co., 145 Mo. 104; 46 S. W. 966; 41 L. R. A. 385.

[48] Vawter v. Hultz, 112 Mo. 633; 20 S. W. 689; 32 Am. L. Rev. 229. Action by widow to recover for husband's killing, brought under Mo. Rev. Stat. 1889, sec. 4426.

[49] Gray v. McDonald, 104 Mo. 303; 16 S. W. 398. In the court of appeals in this case (28 Mo. App. 477), it was held that defendant could show that deceased provoked the difficulty and by his conduct excused or justified the killing, and that mere presence at the wrongful act or subsequent approval did not create a civil liability therefor. Action was brought under sec. 2122 Rev. Stat. 1879 (sec. 4426, Rev. Stat. 1889) and it was also held that recovery could be had if the party injured could have maintained the action if death had not ensued. See Nichols v. Winfrey, 90 Mo. 403; 2 S. W. 305; 79 Mo. 544; Morgan v. Durfee, 69 Mo. 469; White v. Maxey, 64 Mo. 552; Bensenacker v. Sale, 8 Mo. App. 211.

that the latter had learned of such fact prior to the killing, although letters of a compromising character were admitted in evidence, but only to explain why defendant went to the house of deceased on the day of the homicide.[80]

[80] Gilfillan v. McCrillis, 84 Mo. App. 576.

NOTE A. *Liability, etc., to damages to trespassers, licensees and strangers.*

See generally 3 Elliott on Rds. (ed. 1897) secs. 1248–1265; Hutchinson on Carriers (ed. 1891), secs. 553, 555. As to public crossings and statutory obligations toward travelers, see 3 Elliott on Rds. (ed. 1897) secs. 1153–1179. As to rights of electric cars and travelers at street intersections, see Joyce on Elect. Law (ed. 1900), sec. 589, and as to traveler crossing electric street railway tracks, see id. secs. 625–650. Examine also as to licensees, trespassers, railway crossings and warning signals, the following cases: Killing at railway crossing—failure to give signal—contributory negligence. Central Ga. Ry. Co. v. Forshee (Ala. 1900), 27 So. 1006. Conflicting evidence as to ringing of bell at crossing—person killed—verdict for plaintiff not disturbed. Mariposa & P. & S. R. V. R. Co. v. Dean (Ariz. 1900), 60 Pac. 871. Entire duty of engineer as to warning signals at public grade crossing is that prescribed by Conn. Gen. Stat. sec. 3554. Tessmer v. N. Y. N. H. & H. R. Co., 72 Conn. 208; 44 Atl. 38; 15 Am. & Eng. R. Cas. N. S. 164. Death by being struck by car—ordinance unobserved as to rate of speed—engineer's ignorance of ordinance no excuse. Central Ga. Ry. Co. v. Bond, 111 Ga. 13; 36 S. E. 299. Killing at railway crossing—swiftly moving train—contributory negligence. Hopkins v. Southern R. Co., 110 Ga. 85; 35 S. E. 307. Neglect to keep a lookout may make railroad company liable for death of trespasser on track. Crawford v. Southern R. Co., 100 Ga. 870; 33 S. E. 826; 4 Chic. L. J. Wkly. 436; 6 Am. Neg. Rep. 459, citing numerous cases. Death at railway crossing—unsafe rate of speed of train—evidence admissible that crossing in thickly settled part of city. Overtown v. Chicago & E. I. R. Co., 181 Ill. 323; 54 N. E. 898, rev'g 80 Ill. App. 515. Section hand killed by explosion in pump house of defendant—when finding necessary that he was in pump house by express or implied invitation of the company. Cleveland, C. C. & St. L. R. Co. v. Martin, 13 Ind. App. 485; 41 N. E. 1051. Trespasser riding on freight train killed—company not liable even though grossly negligent. Dalton's Adm. v. Louisville & N. R. Co. (Ky. 1900), 56 S. W. 657, citing numerous cases. Failure to give statutory signal at public railway crossing not excusable on mere conjecture that it would not have been heard. Lamb v. Missouri P. R. Co., 147 Mo. 171; 48 S. W. 659; 51 S. W. 81. But see Johnson v. Rio Grande, W. R. Co., 19 Utah, 77; 57 Pac. 17; 13 Am. & Eng. R. Cas. N. S. 691; 6 Am. Neg. Rep. 236. Person killed by collapse of railroad station while he was in there as mere licensee. Godfrey v. N. Y. C. & H. R. R. Co., 161 N. Y. 565; 56 N. E. 77, aff'g 54 N. Y. Supp. 1102. Death at public railway crossing by backing of train—failure to give signal—negligence. Bradley v. Ohio River & C. Ry. Co., 126 N. C. 735; 36 S. E. 181. Killing at railway

crossing—evidence as to duty of engineer to observe deceased. Arrowood v. South Car. & G. Ex. R. Co., 126 N. C. 629; 36 S. E. 151. Defective construction of railroad crossing causing death. Raper v. Wilmington & W. R. Co., 126 N. C. 563; 36 S. E. 115. Death of trespasser riding on construction train—company not liable though killing occasioned by gross negligence. Singleton v. Felton (U. S. C. C. A. Ohio), 42 C. C. A. 57; 101 Fed. 526. Statutory requirements are imperative as to signals on train approaching city or town, and death resulting from failure to observe same gives a right of action. Illinois Cent. R. Co. v. Davis, 104 Tenn. 442; 58 S. W. 296, under Mill & Code, sec. 1298, subs. 3. Railroad company must not unnecessarily or carelessly injure trespasser whom it is ejecting from train. Texas & P. Ry. Co. v. Black (Tex. Civ. App. 1900), 57 S. W. 330. See also Southern P. R. Co. v. Bender (Tex. Civ. App. 1900), 57 S. W. 574. Boy killed while trespasser on gravel train—company not wilfully negligent not liable. House v. Blum (Tex. Civ. App. 1900), 56 S. W. 82.

NOTE B. *Liability and nonliability to damages of railroad companies to employees—Who are and who are not fellow servants.*

General cases of liability and nonliability of fellow servants. When employer liable and when not liable for negligence of coemployee. Kindel v. Hall, 8 Colo. App. 63; 44 Pac. 781. Porter injured in coupling cars by order of conductor, coupling cars not one of his duties; no recovery for engineer's ordinary negligence causing injury, but only for his gross negligence. Cincinnati, N. O. & T. P. R. Co. v. Palmer, 98 Ky. 382; 17 Ky. L. Rep. 998; 33 S. W. 199; 3 Am. & Eng. Corp. Cas. N. S. 435. Employee injured through negligence from incompetency of fellow servant; company not liable except it fails to exercise reasonable care in employing or retaining such fellow servant. Dysart v. Kansas City, F. T. S. & M. R. Co., 145 Mo. 83; 46 S. W. 751. Question whether relations are those of fellow servants may be one of law or one for the jury, dependent largely upon whether facts are disputed. Marshall v. Schricker, 63 Mo. 308. A person is a servant of a railroad company who is employed by the conductor of a freight train in a case of sudden emergency to help in averting danger, or the destruction of the train. Louisville & N. R. Co. v. Ginley, 100 Tenn. 472; 45 S. W. 348; 11 Am. & Eng. R. Cas. N. S. 443, citing several cases. Examine further as to Colorado, Missouri and New Mexico cases, 2 Bailey's Personal Injuries; Master and Servant (ed. 1897), secs. 1852a et seq., 2184 et seq., 2261 et seq., and generally see id. chap. X. See Reno's Employees' Liability Acts (ed. 1896), secs. 48–51, 69–85, 88–92; 3 Elliott on Rds. (ed. 1897) secs. 1316 et seq.

When railroad company liable and also who are not fellow servants. When engineer negligent towards switchman so as to render company liable for injuries to latter. Louisville & N. R. Co. v. Bouldin, 110 Ala. 185; 20 So. 325. Company liable for death of employee due to negligence of section boss. Jones v. Alabama M. R. Co., 107 Ala. 400; 18 So, 30. Employee retained after company's knowledge of his unfitness renders employer liable for injury to coemployee. Gier v. Los Angelos Consol. & Elec. R. Co., 108 Cal. 120; 41 Pac. 22. Foreman in charge of construction of road in absence of

superintendent and who has authority to employ and discharge men is not their fellow servant. Colorado Midland R. Co. v. Brien, 16 Colo. 219; 27 Pac. 701. Employee injured while acting under orders of another employee who had full charge of laying tracks, held a vice principal and company liable. Denver, S. P. & P. R. Co. v. Driscoll, 12 Colo. 520; 21 Pac. 708. See Denver Tramway Co. v. O'Brien, 8 Colo. App. 74; 44 Pac. 766. When engineer and train despatcher are not fellow servants. Darrigan v. N. Y. & N. E. R. Co., 52 Conn. 285. Railroad employee may recover for injury, though negligence of fellow servant was sole cause. Georgia R. & B. Co. v. Cosby, 97 Ga. 299; 22 S. E. 912; Georgia R. & Bkg. Co. v. Hicks, 95 Ga. 301; 22 S. E. 613. As to enforcement of liability in another state for injury caused by fellow servant, and also as to statute and common-law rule, see Chicago & E. I. R. Co. v. Rouse, 178 Ill. 132; 52 N. E. 951; 5 Am. Neg. Rep. 549; 44 L. R. A. 410; 12 Am. & Eng. R. Cas. N. S. 706, aff'g 78 Ill. App. 289. Employee applying power and one superintending drawing up of car loaded with rock in cement kiln are fellow servants and employer not liable for death. Clark Co. Cement Co. v. Wright, 16 Ind. App. 630; 45 N. E. 817. When train despatcher is not fellow servant with employee operating train and master responsible for former's negligence. Missouri, K. & T. R. Co. v. Elliott (U. S. C. C. A. Ind. Ty.), 42 C. C. A. 188; 102 Fed. 96. When railway employee injured by negligence of coemployee is within Iowa Code, sec. 2071, rendering corporation liable. Akeson v. Chicago, B. & Q. R. Co. (Iowa), 75 N. W. 676; 4 Am. Neg. Rep. 384. Death of car inspector while under car—negligence of coemployee—corporation's liability under Code, Iowa, sec. 1037. Canon v. Chicago, M. & St. P. R. Co., 101 Iowa, 613; 70 N. W. 755; 9 Am. & Eng. R. Cas. N. S. 12; 2 Am. Neg. Rep. 131. Section man may recover damages for injury occasioned by negligence of coemployee, under Kentucky statute, making railroad companies liable therefor. Atchison, T. & S. F. R. Co. v. Vincent, 56 Kan. 344; 43 Pac. 251. See also Union P. R. Co. v. Mohaffy, 4 Kan. App. 88; 46 Pac. 187. When stonemason employed by railroad company is not within Fellow Servant's Act. Laws, 1874, ch. 93, sec. 1; Missouri, Kansas & T. R. Co. v. Medaris (Kan. 1899), 55 Pac. 875; 5 Am. Neg. Rep. 339. Engineer under control of brakeman—latter killed making flying switch—corporation not liable. McDermott v. Atchison, T. & S. F. R. Co., 56 Kan. 319; 43 Pac. 248. Servant injured through negligence of fellow servant engaged in common employment—reasonably safe place to work in—master not relieved from liability. Stucke v. Orleans R. Co., 50 La. Ann. 188; 23 So. 342. When negligence of superintendent, or train dispatcher is chargeable to railroad company. Lasky v. Canadian P. R. Co., 83 Mo. 461. If wife or servant injured through negligence of fellow servant, master is liable for consequential damages. Gannon v. Housatonic R. Co., 112 Mass. 234; 17 Am. Rep. 82. Car inspector does not assume risk of injury from switchman's negligence, when latter employed by association of which former's employer was member, although both jointly occupied depot, yards and tracks. Kastl v. Wabash R. Co., 114 Mich. 43; 4 Det. L. N. 475; 72 N. W. 28. Car cleaner injured through negligence of switching crew—company liable

under Minnesota statute. Mitchell v. Northern P. R. Co. (U. S. C. C. D. Minn.), 70 Fed. 15. Fellow servant's negligence causing injury to section man makes railroad company liable, where danger is peculiar to the "railroad business" under the Statute, 1894, sec. 2701. Blomquist v. Great Northern R. Co., 65 Minn. 69; 67 N. W. 804; 4 Am. & Eng. R. Cas. N. S. 439. Employee whose duty is to pull bundles of hay upon stock cars and who is injured obeying conductor's orders is injured by exposure to hazards peculiar to operation of railroads within Stat. 1894, sec. 2701, and company liable. Leier v. Minnesota Belt L. R. & T. Co., 63 Minn. 203; 65 N. W. 269. Employee injured by negligence of coemployee—receiver operating railroad is liable under Minn. Gen. Stat. 1894, sec. 2701. Mikkelson v. Truesdale, 63 Minn. 137; 65 N. W. 260. When expressman employed by express company and who takes care of baggage car is not a fellow servant of employees of railroad in charge of train. Cobb v. St. Louis & H. R. Co., 149 Mo. 609; 50 S. W. 894; 13 Am. & Eng. R. Cas. N. S. 632. Porter of palace car not a fellow servant of those operating engine and train to which his car belongs. Jones v. St. Louis, S. W. R. Co., 125 Mo. 666; 28 S. W. 883; 26 L. R. A. 718. Train operators not fellow servants with employee operating rock crusher. Church v. Chicago & A. R. Co., 119 Mo. 203. Track repairer injured; not fellow servant with train employee. Swadley v. Missouri P. R. Co., 118 Mo. 268. Track repairer injured; not fellow servant with engineer. Schlereth v. Missouri P. R. Co., 115 Mo. 87; 21 S. W. 1110; 19 S. W. 1134. Laborers removing refuse under foreman not fellow servants, but latter a vice principal. Sullivan v. Hannibal & St. J. R. Co., 107 Mo. 66; 17 S. W. 748. Temporary bridge which is defective; erected for construction trains and building permanent bridge, company liable to employee. Bowen v. Chicago, B. & R. C. R. Co., 95 Mo. 268; 8 S. W. 230. Train despatcher with authority over conductor and engineers is not fellow servant. Smith v. Wabash, St. L. & P. R. Co., 92 Mo. 359; 4 S. W. 129. Where negligence of road master, superintending removal of wreck, occasions injury to laborer employed in said removal company is liable, they are not fellow servants. Hoke v. St. Louis, K. & N. R. Co., 88 Mo. 360; 4 West. 69. When foreman a vice principal, company is liable. McDermott v. Hannibal & St. J. R. Co., 87 Mo. 285; 4 West. 641. Liability of company for negligence of vice principal may depend upon the injured person's knowledge of his incompetency. McDermott v. Hannibal & St. J. R. Co., 87 Mo. 285; 4 West. 641. Insufficient or defective appliances, employee injured, knowledge of defects by those having control, company liable. Covey v. Hannibal & St. J. R. Co., 86 Mo. 635; 1 West. 767. Employee injured while obeying foreman in charge of gang of men ballasting road, company liable. Stephens v. Hannibal & St. R. Co., 86 Mo. 221. Brakeman and car inspector not fellow servants. Condon v. Missouri P. R. Co., 78 Mo. 567; 17 Am. & Eng. R. Cas. 583. When negligence of yard master renders company liable. Stoddard v. St. Louis, K. C. & N. R. Co., 65 Mo. 514. Negligence, etc., of fellow servant causing death from injury to servant gives right of action to his representative under Rev. Code Mo. 1855, p. 647 (Rev. Code, 1889, sec. 4425). Schultz v. Pacific R. Co., 36 Mo. 13, rev'd Proctor v. Hannibal & St J. R.Co., 64

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son v. Galveston, H. & S. A. R. Co., 14 Tex. Civ. App. 685; 37 S. W. 786, aff'd 90 Tex. 372; 38 S. W. 745. Foreman of switchman in train department and laborer in car shops are not fellow servants. Pool v. Southern P. R. Co., 20 Utah, 210; 58 Pac. 26. When road master and fireman are not fellow servants—defective culvert—fireman killed—company liable. Davis v. Central Vt. R. Co., 55 Vt. 81. Brakeman on engine hauling coal from mine may recover for injuries caused by negligence of incompetent servant of company when the latter had full knowledge of its servant's incompetency. Carlson v. Wilkeson Coal & C. Co., 19 Wash. 473; 53 Pac. 725. Employee injured by negligence of coemployee—railroad company liable, under Wis. Laws, 1893, ch. 220: Ean v. Chicago, M. & St. P. R. Co., 95 Wis. 69; 69 N. W. 997. When yardmaster is in "charge or control" of "switch" within Wis. Laws, 1889, ch. 438, as to liability of railroad companies for injuries to employees through negligence of coemployees. Albrecht v. Milwaukee & S. R. Co., 94 Wis. 397; 69 N. W. 63. When railroad liable for injury to employee caused by negligence of superior servant. Pevice v. Van Dusen (U. S. C. C. A. 6th C.), 24 U. S. C. C. A. 280; 47 U. S. App. 339; 78 Fed. 693, under Ohio Act, April 2, 1890. When inspector of locomotive boilers is not fellow servant of other employees engaged about locomotive—reasonable care. Texas & P. R. Co. v. Thompson (U. S. C. C. A. 5th C.), 17 C. C. A. 524; 30 U. S. App. 549; 70 Fed. 944; 71 Fed. 531. When railway employee is in charge of cars making the employer liable for the negligence of a person so in charge causing injury to a workman. McCord v. Cammell (H. L. E.), (1896), A. C. 57; 65 L. J. Q. B. N. S. 202. Under English Employer's Liability Act, 1880, sec. 1, subs. 5; 73 L. T. Rep. 634.

When railroad company not liable and also who are fellow servants. That company not liable for injury to brakeman. Alabama Midland R. Co. v. McDonald, 112 Ala. 216; 20 So. 472. When foreman of section crew and conductor are fellow servants. Southern P. R. Co. v. McGill (Ariz.), 44 Pac. 302. Company not liable for injury to employee—pushed off by fellow employee when alighting. St. Louis, I. M. & S. R. Co. v. Ferguson, 65 Ark. 126; 44 S. W. 1123; 10 Am. & Eng. R. Cas. N. S. 634. Bridge foreman is fellow servant with railway engineer, so as to prevent recovery for injuries. St. Louis & S. W. R. Co. v. Henson, 61 Ark. 102; 32 S. W. 1079. That forfeiture statute does not change common-law rule as to fellow servant's negligence, see Atchison, T. & S. F. R. Co. v. Farrow, 6 Colo. 498. Employee having charge of boilers in power house and teamster to haul coal are fellow servants, and in absence of negligence, company not liable for injury. Denver Tramway Co. v. O'Brien, 8 Colo. App. 74; 44 Pac. 766. No recovery for death of member of shifting crew, killed while coupling cars through negligence of engineer shifting cars, since they are fellow servants. Cresswell v. Wilmington & N. R. Co. (Del. Super. Ct.), 43 Atl. 629; 14 Am. & Eng. R. Cas. N. S. 625. When master not liable for injuries through negligence of fellow servant. Camp v. Hall, 39 Fla. 535; 22 So. 792. Engineer and fireman fellow servants under finding and measure of relative duty—death of fireman. Leeper v. Terre Haute & L. R. Co., 162 Ill. 215; 44 N. E. 492. When no liability for

death caused by negligence of fellow servant—same line of employment—necessity for due care. Chicago, B. & Q. R. Co. v. Libey, 68 Ill. App. 144; Terre Haute & I. R. Co. v. Leeper, 60 Ill. App. 194. Employee injured while acting under superior coemployee's directions—no liability. Robertson v. Chicago & E. R. Co. 146 Ind. 486; 45 N. E. 655; 6 Am. & Eng. R. Cas. N. S. 611. Engineer's death caused directly by negligence of fellow servant—company not liable. Evansville & T. H. R. Co. v. Tohili, 143 Ind. 60; 42 N. E. 352, denying rehearing 143 Ind. 49; 41 N. E. 709. Machinist repairing engines is not vice principal or superior of employees called in occasionally to assist him, whom he has no authority to employ or discharge, and over whom he has only temporary control. Company not liable for injury to such employees caused by former's negligence. Hathaway v. Illinois C. R. Co. (Iowa), 60 N. W. 651. Railroad employee injured by car inspector's negligence; no joint liability of company and inspectors. Hukill v. Maysville & B. S. R. Co. (U. S. C. C. D. Ky.), 72 Fed. 745. See also to same point, Warax v. Cincinnati, N. O. & T. P. R. Co. (U. S. C. C. D. Ky.), 72 Fed. 637. Death caused by negligence of fellow servant of equal grade and in same field of labor; no liability of master under Const. sec. 241, nor Ky. Stat. sec. 6; Lincks' Admr. v. Louisville & N. R. Co. (Ky.), 54 S. W. 184. Conductor of construction train and employee through whose negligence defective appliance exists are fellow servants with employee injured by reason of such appliance while obeying conductor's orders. Cassidy v. Maine Cent. R. Co., 76 Me. 483. Engineer and train despatcher under division superintendent are fellow servants. Norfolk & W. R. Co. v. Hoover, 79 Md. 253; 29 Atl. 994. When trainman is fellow servant with brakeman and company not liable. Young v. Boston & M. R. Co., 168 Mass. 219; 46 N. E. 624. When brakeman does not have "charge or control" of train so as to make railroad company liable to employee for negligence of person having "charge or control," under Mass. Stat. 1887, ch. 270, sec. 1, cl. 3; Caron v. Boston & A. R. Co., 164 Mass. 523; 42 N. E. 112. Switchman killed through negligence of inspector to determine whether cars properly loaded with lumber; company not liable as negligence was that of a fellow servant. Lellis v. Michigan Cent. R. Co. (Mich. 1900), 82 N. W. 828. Brakeman coupling cars and fireman who dumps ashes on track and section men who remove them are fellow servants; no recovery by former for their negligence. Loranger v. Lake Shore & M. S. R. Co. (Mich.), 63 N. W. 137. Negligence of motorman in failing to give warning, required by rule of the company to track crews is negligence of fellow servant, and company is not liable for neglect to use reasonable care to provide trackmen a safe place. Lundquist v. Duluth St. R. Co., 65 Minn. 387; 67 N. W. 1006; 4 Am. & Eng. R. Cas. N. S. 506. Street car companies are not within the statute of 1887, ch. 13, as to railway companies and injuries to employees by fellow servants' negligence. Lundquist v. Duluth St. R. Co., 65 Minn. 387; 67 N. W. 1006; 4 Am. & Eng. R. Cas. N. S. 506. Tender of railroad drawbridge is fellow servant of section hand injured while riding in hand car by negligence of the former. Illinois Cent. R. Co. v. Bishop, 76 Miss. 758; 25 So. 867. Train master may be fellow servant with brakeman coupling

cars. Martin v. Chicago & A. R. Co. (U. S. C. C. W. D. Mo.), 65 Fed. 383. Head hostler of roundhouse and locomotive fireman and "wiper or fire puller"—former is fellow servant and not vice principal—company not liable for personal injuries to fireman—incompetence of latter employee and knowledge of hostler not chargeable to company. Smith v. St. Louis & S. F. R. Co,, 151 Mo. 391; 52 S. W. 378; 14 Am. & Eng. R. Cas. N. S. 609. Brakeman on freight train is fellow servant with engineer of the train. Dysart v. Kansas City Ft. S. & M. R. Co., 145 Mo. 83; 46 S. W. 751. When fireman on running train is fellow servant with section foreman. Card v. Eddy (Mo.), 28 S. W. 979. Employee of railroad is not within Gen. Stat. Mo. 1865, ch. 63, requiring bell to be rung within a specified distance from a railroad crossing, otherwise the corporation to be held liable for damages occasioned by such neglect. Rohback v. Pacific R. Co., 43 Mo. 187. Fireman and engineer are, as to management of locomotive, fellow servants and company is not liable for injury to fireman unless master fails in duty as to employment or retention. Mulligan v. Montana U. R. Co., 19 Mont. 135; 47 Pac. 795. For negligence of fellow servant causing injury to employee, master not liable in absence of statute. Chicago, B. & Q. R. Co. v. Kellogg, 54 Neb. 127; 74 N. W. 454, modified 76 N. W. 462. When foreman of gang of laborers on railroad is fellow servant with them. Hawley v. Grand Trunk R. Co., 62 N. H. 274. See Fifield v. Northern R. Co., 42 N. H. 225. Where employees of one railroad company are fellow servants though on separate trains. Lutz v. Atlantic & P. R. Co. (N. Mex.), 50 Pac. 912. When railway brakeman fellow servant of car inspector and company not liable for injury to former. Eaton v. N. Y. C. & H. R. Co., 14 App. Div. (N. Y) 20; 43 N. Y. Supp. 666. Car repairer killed through negligence of a fellow servant—company not liable. Moeller v. Delaware, L. & W. R. Co., 13 App. Div. (N. Y.) 467; 43 N. Y. Supp. 603. Section master is fellow servant of engineer of train in which he rides to and from work and company not liable for latter's negligence, even though he is also conductor of said train. Wright v. Northampton & H. R. Co., 122 N. C. 852; 29 S. E. 100; 10 Am. & Eng. R. Cas. N. S. 151. Brakeman injured by engineer's negligence; company not liable as they are fellow servants. Chaddick v. Lindsay, 5 Okla. 616; 49 Pac. 940. Employees on bridge work, an overseer and his section men working on track, all employees of same company are fellow servants. Brunell v. Southern P. R. Co., 34 Ore. 256; 56 Pac. 129; 5 Am. Neg. Rep. 711, citing several cases. When conductor of freight train is not a vice principal but fellow-servant of engineer and brakeman within the rule of exemption of railroad company from liability for injuries to one caused by another servant's negligence. New England R. Co. v. Conroy (R. I.), 175 U. S. 323; 20 S. Ct. 85; 44 L. Ed.—, citing numerous cases. Engineer of "wild engine" and brakeman of another colliding train are fellow servants and former is not a vice principal. Healey v. N. Y. N. H. & H. R. Co., 20 R. I. 136; 37 Atl. 676; 3 Am. Neg. Rep. 98. Yard conductor appointed to take care of a switch is a fellow servant with a fireman on a train injured by the former's negligence. Parker v. N. Y. & N. E. R. Co. (R. I.), 30 Atl. 349. When

track walker traveling on railroad velocipede is fellow servant with engineer running engine over same road in same direction. Stephain v. Southern P. R. Co., 19 Utah, 196; 57 Pac. 34; 6 Am. Neg. Rep. 222; 14 Am. & Eng. R. Cas. N. S. 575. Employee's death occasioned by negligence of fellow servant, a conductor; railroad company not liable—case of collision of passenger and freight trains. Norfolk & W. R. Co. v. Houchins, 95 Va. 398; 3 Va. L. Reg. 807; 28 S. E. 578; 8 Am. & Eng. R. Cas. N. S. 616; 64 Am. St. Rep. 791. Trainmen on different trains are fellow servants. Norfolk & W. Va. R. Co. v. Houchins, 95 Va. 398; 3 Va. L. Reg. 807; 28 S. E. 578; 8 Am. & Eng. R. Cas. N. S. 616; 64 Am. St. Rep. 791, citing numerous cases. For rule as to common employment and who are fellow servants so as to relieve master from liability for negligence toward each other; and when conductor is fellow servant with freight train, brakeman coupling cars, see Jackson v. Norfolk & W. R. Co., 43 W. Va. 380; 27 S. E. 278; 2 Chic. L. J. Wkly. 300; 6 Am. & Eng. R. Cas. N. S. 455, rev'g Madden v. Chesapeake & O. R. Co., 27 W. Va. 610; Daniel v. Chesapeake & O. R. Co., 36 W. Va. 397; 16 L. R. A. 383; Haney v. Pittsburgh, C. C. & St. L. R. Co., 38 W. Va. 570, following Oakes v. Mase, 165 U. S. 363; 41 L. Ed. 746, considering Chicago, M. & St. P. R. Co. v. Ross, 112 U. S. 377; 28 L. Ed. 787, and citing numerous cases. Under Wis. Laws, 1893, ch. 220, railroad companies are liable for injury to employee through coemployee's negligence; car repairer not entitled to its benefits. This case also holds that car repairer is a fellow servant of a switchman and employer is not liable for injury unless made so by statute. Smith v. Chicago, M. & St. P. R. Co., 91 Wis. 503; 65 N. W. 183. Foreman of repair shop is not a "superintendent" within Sanb. & B. Ann. Stat. sec. 1816a, so as to make a railroad company liable for damages sustained by employee. Hartford v. Northern P. R. Co., 91 Wis. 374; 64 N. W. 1033. Negligence of section foreman causing injury to laborer on hand car with him, by reason of failure to watch for train, does not make company liable. Martin v. Atchison, T. & S. F. R. Co., 166 U. S. 399; 17 Sup. Ct. Rep. 603; 41 L. Ed. 1051. Boss of small gang of men making repairs upon railroad aiding the regular gang when needed is fellow servant of another member of the gang and not a superintendent of a separate department. Northern P. R. Co. v. Peterson, 162 U. S. 346; 16 Sup. Ct. Rep. 843; 40 L. Ed. 994. When foreman of drill crew is fellow servant with other laborers of the crew so that railroad company not liable to one of them for foreman's negligence. Central R. Co. v. Keegan, 160 U. S. 259; 16 Sup. Ct. Rep. 269; 40 L. Ed. 518. Where negligence of pin puller causes injury to a coupler who is a fellow servant, the company is not liable for conductor's incompetency who was not in fault for the accident. Central R. Co. v. Keegan (U. S. C. C. App. 2d C.), 51 U. S. App. 489; 82 Fed. 174.

CHAPTER XXX.

DEATH—"SUCH DAMAGES AS ARE JUST WITH REFERENCE TO THE PECUNIARY INJURY."

§ 710. "Such damages as are just with reference to the pecuniary injury"—Statutes—Pecuniary loss—Generally.
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722. "Such damages as are just with reference to the pecuniary injury"—Death of children.
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724. Death—Mitigation of damages—Defenses—Insurance.

§ 710. "Such damages as are just with reference to the pecuniary injury"—Statutes—Pecuniary loss—Generally.—

In Vermont the court or jury may give such damages as are just with reference to the pecuniary injury resulting from such death to the wife or next of kin, and the recovery is for their benefit. The wrongful act, neglect or default must be such as would, if death had not ensued, have entitled the party injured to maintain an action and recover damages in respect thereof, and the recovery may be had, although the death is caused under such circumstances as amount in law to a felony.[1] The right of action for an injury also survives,[2] and this latter enactment has an important bearing upon the nature of the recovery, both as affecting the elements of damages and as to the effect of a recovery in an action for the injury upon the right to sue for the death.[3] If an administrator sues for the negligent killing of her intestate, it is sufficient to allege every act necessary to be proven to bring the action within the statute, nor need the statute be referred to in express terms,[4] and the rights of the respective distributees need not be specifically averred, for it is only necessary to set forth adequately the right of the personal representative to sue.[5] But it should appear whether the action is for the benefit of the estate or of the widow and next of kin, and the original writ may be referred to for description to help out a material averment of the declaration. So the existence of statutory beneficiaries must be averred, although it is sufficient to state the death by the tortious act or neglect of defendant, and that a widow or next of kin or either of them survive, without setting forth particulars as to residence, age or other facts relating to them.[6] The beneficiaries, however, seeking damages under the death statute can recover them only with

[1] Comp. Stat. Vt. 1894, sec. 2451; Rev. Laws, Vt. 1880, secs. 2138, 2139; Gen. Stat. Vt. 1863, secs. 15, 16, ch. 52. This last statute provided that the damages were for the exclusive benefit of the widow and next of kin, and the action was also brought by the personal representative.

[2] Stat. Vt. 1894, sec. 2447; Gen. Stat. 1870, p. 391, sec. 11; Stats. 1847, No. 42, p. 29. See Needham v. Grand Trunk R. Co., 38 Vt. 294. See Rev. Laws, Vt. 1880, secs. 2132, 2133.

[3] See sec. 713, herein.

[4] Morrisey v. Hughes, 65 Vt. 553; 27 Atl. 205.

[5] Howard v. Delaware & H. Can. Co. (U. S. C. C. D. Vt.), 40 Fed. 195; 6 L. R. A. 75; 41 Am. & Eng. R. Cas. 473.

[6] Westcott v. Central Vt. R. Co., 61 Vt. 438; 17 Atl. 745; Geroux v. Graves, 62 Vt. 280; 19 Atl. 987.

reference solely to the pecuniary injury resulting from such killing to those designated, and the intestate's cause of action cannot be considered in assessing the damages,[7] and the actual probable pecuniary loss is all that the statute covers.[8]

§ 711. "Such damages as are just with reference to the pecuniary injury"—Nominal damages.—In order to entitle the wife or next of kin to nominal damages under the Vermont statute, something more than mere proof of death by negligence is required.[9]

§ 712. "Such damages as are just with reference to the pecuniary injury"—Factors generally to be considered.—Deceased's age, sex, occupation, earnings and life expectancy, may be shown, as well as the relations sustained to the beneficiaries, legal and actual.[10] But the particulars as to the persons of the beneficiaries need not be alleged.[11]

§ 713. "Such damages as are just with reference to the pecuniary injury"—Sufferings of injured person.—In determining whether or not damages are recoverable for the sufferings of the injured party for whose negligent killing the action is brought, the nature of the action under which damages are sought should be considered, as whether the right of action rests upon the death statute, or is a survival of the action brought by the injured party during his lifetime. The Vermont statute of 1849 gave to the executor or administrator the right to sue and recover for the wife and next of kin, whenever the intestate, if living, could have maintained an action for the act causing the injury which occasioned the death, and such is the present

[7] Needham v. Grand Trunk R. R. Co., 38 Vt. 294.

[8] Howard v. Delaware & H. Can. Co. (U. S. C. C. D. Vt.), 40 Fed. 195, 198.

[9] Lazelle v. Newfane, 70 Vt. 440; 41 Atl. 511. See Howard v. Delaware & H. Can. Co. (U. S. C. C. D. Vt.), 40 Fed. 195, 198. See as to allegation of damages, age, etc., Westcott v. Central Vt. R. Co., 61 Vt. 438; 17 Atl. 745; Morrisey v. Hughes, 65 Vt. 553; 27 Atl. 205; Howard v. Delaware & H. Can. Co. (U. S. C. C. D. Vt.), 40 Fed. 195; 6 L. R. A. 75; 41 Am. & Eng. R. Cas. 473.

[10] See Lazelle v. Newfane, 70 Vt. 440; 41 Atl. 511; Howard v. Delaware & H. Can. Co. (U. S. C. C. D. Vt.), 40 Fed. 195; 6 L. R. A. 75; 41 Am. & Eng. R. Cas. 473.

[11] Westcott v. Cent. Vt. R. Co., 61 Vt. 438; 17 Atl. 745.

statute. But if the administrator recover judgment upon the cause of action brought by the injured party, and which has survived, this constitutes a bar to an action for the death by the administrator for the benefit of the survivor.[12] Formerly, however, where a bodily injury caused by negligence or wrongful act, resulted in death and was the proximate cause thereof, the injured person had a right of action for his suffering and loss, consequent upon the injury, which cause was revived by statute, and the widow and next of kin had a cause of action for damages resulting to them by reason of the death, but in this latter instance the intestate's cause of action could not be considered.[13] In a comparatively recent case in Wisconsin,[14] Marshall, J., referring to both of these Vermont decisions, says, as to the assertion that the later case overruled the earlier one on the point whether there were two causes of action in the circumstances under discussion, "A careful reading of the opinion of the later Vermont case discloses the fact that it is there held, in perfect harmony with the earlier case, that two causes of action exist; one in the right of the estate, and the other in the right of the surviving relatives, where the cause of action of the deceased is not extinguished before his death. The court said that the extinguishment of the cause of action in the right of the deceased was a bar to that in favor of the surviving relatives. There the action for damages to the injured person was brought in his lifetime, and prosecuted to judgment and satisfaction after his death, and the court said that under such circumstances the right of the deceased was extinguished with the same effect as if satisfaction had occurred before death, therefore the circumstances requisite to the application of the statute, giving the right of action to the widow and next of kin did not exist. Using substantially the language of the court, there was left no proper office for the act for the benefit of the widow and next of kin to perform." This seems to be a most clear and concise statement

[12] Legg v. Britton, 64 Vt. 652; 24 Atl. 1016.

[13] Needham v. Grand Trunk R. Co., 38 Vt. 294, under Stats. 1847, Mo. 42, p. 29, and of 1849, Mo. 8, p. 7; Rev. Stat. Vt. secs. 2133, 2134; Rev. Laws, 1880, sec. 2138.

[14] Brown v. Chicago & Northwestern R. Co., 102 Wis. 137; 77 N. W. 748; 44 L. R. A. 579; 13 Am. & Eng. R. Cas. N. S. 603; 5 Am. Neg. Rep. 255, rehearing denied 44 L. R. A. 585; 78 N. W. 771; 13 Am. & Eng. R. Cas. N. S. 603.

of the actual effect of the later Vermont decision. The connecting link between the right of action for the negligent or wrongful killing and the cause of action for the injury, which cause survives, is the right which the wife and next of kin have, subject to the limitation thereon, that the intestate, if living, could have maintained the action for the injury which occasioned the death. This connecting link eliminates the question whether or not the two causes of action, one for the injury and the other for the death, rest upon the same principles. It also disposes of another proposition which would logically follow if the survival and the death statute rested upon the same principles, for in the survival suit the intestate's cause of action, and his loss and sufferings being proper factors for consideration, then necessarily these elements would attach to the death damages. But inasmuch as the death statute gives a different cause of action from that of the injured parties and one independent thereof, except for the connecting link above noted, then since deceased's sufferings do not attach to the death itself as an injury to the survivors, they are not an element of damages under such statutory provision, although they are factors in the survival suit which is still in effect that of the injured party.

§ 714. "Such damages as are just with reference to the pecuniary injury"—Legal obligation and legal right to support.—It is not necessary that a father should have a legal claim upon his adult son for support to enable him to recover damages for the latter's negligent killing,[15] nor need children have been dependent upon their deceased mother for material support, nor need the obligation on her part to support them have existed, for the right to damages is independent of such legal claims.[16] This rule would also apply to collateral kindred where the action is by the personal representative for the benefit of the wife or next of kin.[17]

[15] Boyden v. Fitchburg R. Co., 70 Vt. 125; 39 Atl. 771; 10 Am. & Eng. R. Cas. N. S. 523, citing several cases.

[16] Eames v. Brattleboro, 54 Vt. 471.

[17] Howard v. Delaware & H. Can. Co. (U. S. C. C. D. Vt.), 40 Fed. 195; 6 L. R. A. 75; 41 Am. & Eng. R. Cas. 473. Deceased was about 37 years old and was a railroad trackman. He had no parents, wife or child, but three brothers and two sisters survived. He left no property.

§ 715. "Such damages as are just with reference to the pecuniary injury"—Solatium—Mental suffering—Loss of society, etc.—The clause, "such damages as are just with reference to the pecuniary injury," does not allow compensation for mental suffering,[18] nor for loss of society, affection or counsel.[19]

§ 716. "Such damages as are just with reference to the pecuniary injury"—Reasonable expectation of pecuniary benefit—Prospective damages.—The reasonable expectation of deriving some pecuniary advantage except for the killing of the intestate constitutes a ground of recovery.[20] But a son seeking recovery for a mother's negligent killing must show a loss of pecuniary assistance which he might reasonably have expected to have received from her except for her premature death, and this expectation must be considered in view of her ability to have rendered such aid, as well as in the light of her probable health and continued life.[21] Again, the jury may properly be instructed in an action for an employee's killing that they should reduce to its present worth the amount allowed for prospective damages, even though no rule is stated, and it is left to the jury to ascertain such present worth, the results of different modes of computing interest being suggested.[22]

§ 717. "Such damages as are just with reference to the pecuniary injury"—Physical and financial condition, age, number of family, etc.—Ability to render pecuniary aid to a child should be considered where the loss of pecuniary assistance consequent upon the negligent killing of a mother is relied on in an action to recover damages for her death.[23] Deceased's health is also a factor,[24] but it is not necessary in order to con-

[18] Needham v. Grand Trunk R. Co., 38 Vt. 294.

[19] Howard v. Delaware & H. Can. Co. (U. S. C. C. D. Vt.), 40 Fed. 195, 198, per Wheeler, J.

[20] Boyden v. Fitchburg R. Co., 70 Vt. 125; 39 Atl. 771; 10 Am. & Eng. R. Cas. N. S. 523, a case of action by father for son's death under Vt. Stat. secs. 2451, 2452; Eames v. Brattleboro, 54 Vt. 471.

[21] Lazelle v. Newfane, 70 Vt. 440; 41 Atl. 511, citing several cases.

[22] Morrisey v. Hughes, 65 Vt. 553; 27 Atl. 205.

[23] Lazelle v. Newfane, 70 Vt. 640; 41 Atl. 511.

[24] Lazelle v. Newfane, 70 Vt. 640;

stitute a cause of action to allege the age, residence or other particulars relating to the persons of the beneficiaries.[25]

§ 718. "Such damages as are just with reference to the pecuniary injury"—Probable accumulations.—Where the beneficiary seeks to recover damages for the negligent killing of one from whom he had no right to claim support, the pecuniary injury is the loss of the probable accumulations of deceased had he lived.[26]

§ 719. "Such damages as are just with reference to the pecuniary injury"—Expenses of funeral and of sickness.—Defendant is not prejudiced by the admission of evidence that deceased's medical attendant had received no compensation for his services where nothing further is proven concerning his employment or the presentation of his account.[27] And where injuries are inflicted upon an infant too young to render services, the parent can recover the necessary medical and other extra expenses incurred up to the time of such child's death, but the burial expenses cannot be recovered in such case.[28]

§ 720. "Such damages as are just with reference to the pecuniary injury"—Death of parent.—If a son seeks recovery for the negligent killing of his mother, he must show a loss of pecuniary assistance which he had a reasonable expectation of receiving from her, based upon her ability to render such aid and also upon her continued life and health.[29]

41 Atl. 511. See cases in next following note.

[25] Westcott v. Cent. Vt. R. Co., 61 Vt. 438; 17 Atl. 745. See Howard v. Delaware & H. Can. Co. (U. S. C. C. D. Vt.), 40 Fed. 195; 6 L. R. A. 75; 41 Am. & Eng. R. Cas. 473; Morrisey v. Hughes, 65 Vt. 553; 27 Atl. 205.

[26] Howard v. Delaware & H. Can. Co. (U. S. C. C. D. Vt.), 40 Fed. 195; 6 L. R. A. 75; 41 Am. & Eng. R. Cas. 473.

[27] Ranney v. Johnsburg & L. C. R. Co., 67 Vt. 594; 32 Atl. 810.

[28] Trow v. Thomas, 70 Vt. 580; 41 Atl. 652.

[29] Lazelle v. Newfane, 70 Vt. 440; 41 Atl. 411 and Vt. Stat. sec. 2452, citing Tilley v. Hudson R. R. Co., 24 N. Y. 471; McIntyre v. New York C. R. Co., 37 N. Y. 287; Louisville, N. A. & C. R. Co. v. Goodykoontz, 119 Ind. 111; Franklin v. Southeastern R. Co., 3 Hurlst. & N. 211; 8 Eng. Rul. Cas. 419; Illinois C. R. Co. v. Barron, 5 Wall. (U. S.) 90; 18 L. Ed. 591. See also Eames v. Brattleboro, 54 Vt. 471, and see sec. 714, herein.

§ 721. "Such damages as are just with reference to the pecuniary injury"—Death of parent—Moral, etc., training of children.—Where the statute[20] requires that children shall be given certain mental, etc., training in schools and this recognizes the pecuniary value thereof, the jury may be properly instructed that the physical, moral and intellectual training of minor children which they would have received from their father, had he not been killed, are all elements of damages to be considered in an action for the father's wrongful killing.[21]

§ 722. "Such damages as are just with reference to the pecuniary injury"—Death of children.—The right of a parent to the services of his minor child is an abstract proposition of law. What the value of these services is must necessarily depend upon the facts as to the child's age and sex, general intelligence and health, and the cost of such minor's support and education should be deducted, although if the cost thereof should be deducted in the case of infants who had not reached an age where they could render services capable of a money valuation, there would be no provable damages recoverable, and it cannot be the intent of the statute, which provides for "such damages as are just with reference to the pecuniary injury," that a parent should recover nothing for the negligent killing of a very young child. The pecuniary injury should have reference to prospective losses, or as we have stated elsewhere, the reasonable expectation of deriving some pecuniary advantage from the continued life of the deceased constitutes an element of pecuniary loss under the statutory clause above noted. Therefore, in deducting the cost of support and education during minority, the prospects in life of the child, in view of all the circumstances should be considered, and this reasonable expectation of pecuniary benefit applies also to the case of death of an adult child.[22]

[20] Vt. Stat. sec. 683.

[21] Hoadley v. International Paper Co., 72 Vt. 79; 47 Atl. 169.

[22] See Boyden v. Fitchburg R. Co., 70 Vt. 125; 39 Atl. 771; 10 Am. & Eng. R. Cas. N. S. 523. A case of death of adult son. Needham v. Grand Trunk R. Co., 38 Vt. 294. No action at common law for death of son. Sherman v. Johnson, 58 Vt. 40. As to parent's right to child's earnings, see Atkins v. Sherbino, 58 Vt. 248. As to emancipation of child, see Craftsbury v. Greensboro, 66 Vt. 585; 29 Atl. 1024; Northfield v. Brookfield, 50 Vt.

§ 723. "Such damages as are just with reference to the pecuniary injury"—Collateral kindred.—The Vermont statute provides for a recovery by the next of kin, and in one respect at least, the courts have made no difference between collateral and lineal kindred, that is in neither case as we have elsewhere noted does the right to recover depend upon a legal claim or obligation to support.[33]

§ 724. Death—Mitigation of damages—Defenses—Insurance.—Money received on an insurance policy on deceased's life cannot be proven in mitigation or reduction of damages.[34]

62; Sherburne v. Hartland, 37 Vt. 528.

[33] See sec. 714, herein. Deceased was about 37 years old, had three brothers and two sisters, no wife, children or parents, and had accumulated no property. He was a trackman employed by a section boss on defendant's road. The action was brought under R. L. Vt. secs. 2138, 2139. Action was for benefit of brothers and sisters as next of kin. "Question is made as to the sufficiency of the allegations of the declaration for supporting a recovery for the benefit of the brothers and sisters. If the action was given directly to those suffering the injury, the declaration would need to set forth the facts constituting the right of recovery of those who should bring suit. But the action is given to the personal representative; and the right is the same for whosesoever benefit the suit may be brought. The recovery is to go to the widow and next of kin as the personal estate would, exclusive of creditors and legatees. Railroad Co. v. Barron, 5 Wall. (U. S.) 90. The questions as to who are beneficiaries are left until distribution. A declaration which sets forth adequately the right of the personal representative to recover would seem to be sufficient without alleging specifically the rights of the respective distributees." "In this case, deceased had accumulated nothing for any one up to the time of his death in middle life. He was no more likely to accumulate property from then forward than before. The deprivation of his society, affection or counsel is not to be considered. The actual, probable, pecuniary loss is all that the statute covers and can be allowed for. Upon the evidence, considering all the probabilities of his future, no just ground for finding that he would ever have accumulated any property for his brothers and sisters is apparent." Howard v. Delaware & H. Can. Co. (U. S. C. C. D. Vt.), 40 Fed. 195, 198, per Wheeler, J., quoted in Serensen v. Northern P. R. Co. (U. S. C. C. D. Mont.), 45 Fed. 407, 411. In the Howard case the court also says, "The pecuniary injury resulting from the death is the loss of what deceased would probably have accumulated afterwards if he had lived," followed by the above quotation. This rule was applied in an action for the benefit of collateral kindred and only nominal damages were awarded on the basis that he had accumulated nothing.

[34] Harding v. Townshend, 43 Vt. 536; 5 Am. Rep. 304, criticising Hicks v. Newport, A. & H. R. Co., 4 B. & S. 403.

CHAPTER XXXI.

DEATH—"SUCH DAMAGES" "AS UNDER ALL THE CIRCUMSTANCES OF THE CASE MAY BE JUST."

§ 725. "Such damages" "as under all the circumstances of the case may be just"—Statutes.
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744. "Such damages" "as under all the circumstances of the case may be just"—Death of husband—Husband and father.
745. "Such damages" "as under all the circumstances of the case may be just"—Death of wife.
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749. "Such damages" "as under all the circumstances of the case may be just"—Death of child.
750. "Such damages" "as under all the circumstances of the case may be just"—Death of child—Minority and majority.
751. "Such damages" "as under all the circumstances of the case may be just"—Collateral relations.
752. "Such damages" "as under all the circumstances of the case may be just"—Defenses — Defendants' aid.

§ 725. "Such damages" "as under all the circumstances of the case may be just"—Statutes.—In California,[1] Idaho,[2] Montana,[3] and Utah,[4] "such damages may be given as under all the circumstances of the case may be just." The action lies

[1] Code Civ. Proc. 1889, secs. 376, 377. Under the Cal. Code Civ. Proc. 1872, sec. 377, the heirs or personal representatives could maintain the action where death was caused by the wrongful act or neglect of another, and the jury could give such damages, pecuniary or exemplary, as under all the circumstances of the case seemed just. The statutes also covered death caused in falling through an opening, or defective sidewalk, street, alley, square or wharf, and provided that in such cases, the heirs, or personal representatives, could sue the person whose duty it was to keep the sidewalk, etc., in repair. As to injuries to employees, see Code, sec. 1970.

[2] Rev. Stat. 1891, sec. 4050–4055; Rev. Stat. 1887 (1891), secs. 4099, 4100.

[3] Mont. Codes (Civ. Proc.), 1895, secs. 578–579; Comp. Stat. 1888, secs. 13, 14, p. 62. There is also a general statute in this state (Mont. Comp. Stat. 1888, p. 911, secs. 981, 982), providing for a fair and just compensation with reference to the pecuniary injuries. See chap. 27, herein.

[4] Rev. Stat. Utah, 1898, p. 643, secs. 2911, 2912; 2 Utah Comp. Laws, 1888, secs. 3178, 3179. There is also a general statute in this state, which provides that the recovery shall not exceed $10,000, and that the amount recoverable shall be distributed by

by the heirs or personal representatives, for death caused by the wrongful act or neglect of another, and where deceased was a minor, the father may maintain the action, or in case of his death or desertion, then the mother may sue, or a guardian for his ward. The person causing the death is liable, or if he is employed by a person responsible for his action, then the latter is also liable.[5] Under the California statute the surviving husband, as an individual, and as guardian ad litem of minor children, may recover, since the children are also entitled to the benefit of the action.[6] Nor under an earlier decision are the damages part of the estate.[7] If the suit is by the father, it cannot be shown that deceased intended to sue.[8] And an action by the personal representatives is a bar to one by the heirs, for the right of separate recovery does not exist in both.[9] But the executor or administrator only can maintain the action, under an early decision in that state.[10]

§ 726. Employee and miners—And other statutory provisions.—In California,[11] Idaho,[12] Montana,[13] and Utah,[14] the

the probate court to such persons, other than creditors, as are by law entitled to distributive shares of the estate, in such proportions as are provided by law. Comp. Laws, Utah, 1888, secs. 2961, 2962. These sections have been applied with secs. 3178, 3179, in connection with death of a railroad employee, in Chilton v. Union P. R. Co. (Utah), 29 Pac. 903; and see Laws, 1896, ch. 24. As to Coal Miner's Act, see Rev. Stat. 1898, p. 39, sec. 1526. See also Laws, 1901, sec. 14, p. 91.

[5] That one, who in compliance with command of an officer and who accompanies him with others on land to execute a writ of possession, is not liable for the killing by the officer, or another, of one unlawfully in possession, where only reasonable force in the execution of the writ was used, see Burnham v. Stone, 101 Cal. 164; 35 Pac. 627.

[6] Redfield v. Oakland Consol. St. R. Co., 110 Cal. 277; 42 Pac. 882, case was modified 42 Pac. 1063. That father may forfeit right as guardian of minor child, see Re Vance, 92 Cal. 195; 28 Pac. 229.

[7] Munro v. Pacific Coast D. & R. Co., 84 Cal. 515; 24 Pac. 303.

[8] Lange v. Schoettler, 115 Cal. 388; 47 Pac. 139.

[9] Hartigan v. Southern P. R. Co., 86 Cal. 142; 24 Pac. 851; Munro v. Pacific Coast D. & R. Co., 84 Cal. 515; 24 Pac. 303.

[10] Kramer v. Market St. R. Co., 25 Cal. 434.

[11] Code Civ. Proc. 1899, secs. 376, 377.

[12] Rev. Stat. 1877, secs. 4099, 4100.

[13] Codes (Civ. Proc.), 1895, secs. 578, 579.

[14] Rev. Stat. 1898, p. 643, secs. 2911, 2912.

statutes cover the death of one employed by another, while in Utah the miners' statute also covers death, and such enactment allows a recovery for the full damage sustained.[15]

§ 727. Measure of damages—Opinons of courts and particular decisions.—The statute does not authorize damages for sufferings of deceased, nor for grief and sense of bereavement on the part of surviving relatives. Only the direct pecuniary loss to the heirs of the deceased can be considered. "The language of the statute is that 'such damages may be given as under all the circumstances of the case may be just.' This in effect means that the damages shall rest in the sound discretion of the court or jury, a discretion to be exercised in view of the fact 'that such damages are to be measured by what shall fairly seem the pecuniary injury or loss to the plaintiff.'[16] And it is manifest that in reaching a conclusion in relation to the proper sum to be awarded, a conclusion which must be based solely upon a consideration of what the deceased might probably have earned by his labor, or realized from his business in the future for the benefit of his heirs, the court is necessarily compelled to proceed upon very uncertain data. . . . Even if it should be assumed that the deceased would have lived the full period of his life expectancy, it is reasonable to suppose that his later years would have been feeble, and it would be contrary to all experience to assume that he would have been in the constant receipt of wages while he lived, or if engaged in business that he would certainly have met with continued success. In estimating the damages, therefore, in this class of actions, the fluctuations in business, if the deceased was engaged in business, and if not in business, the uncertainty as to what might have been the future condition of his health and ability to perform labor, and of securing constant employment at the present rate of wages, must be allowed due weight, so that as nearly as possible the judgment given shall 'be just, alike to the injured and injurer.'"[17] Again, in the

[15] Rev. Stat. Utah, 1898, p. 391, sec. 1526. See also Laws, 1901, p. 91, sec. 14.

[16] Citing Morgan v. Southern Pac. Co., 95 Cal. 501; 30 Pac. 601; In re Humboldt Lumber Mfrs. Assoc. (U. S. D. C.), 60 Fed. 428.

[17] (Citing Cheatham v. Red River Line [U. S. D. C.], 56 Fed. 248.) In re California Nav. & Imp. Co. (U. S.

same case it was declared that where there is no evidence that brothers and sisters had any reasonable expectation that deceased would ever give them, or leave them, or any of them, anything of value, and no evidence that he was in the habit of saving his wages, only nominal damages can be recovered in a court of law, and nothing in admiralty, since in such courts nominal damages for personal torts are not awarded.[18] In another case the de-

D. C. N. D. Cal.), 110 Fed. 670, 676, 677, per De Haven, Dist. J.

[18] In re California Nav. & Imp. Co. (U. S. D. C. N. D. Cal.), 110 Fed. 670–677. "The case of Burk v. Railroad Co., 125 Cal. 364; 57 Pac. 1065; 73 Am. St. Rep. 52, was an action brought by a sister and two brothers of one Burk to recover damages, for his death which was alleged to have been caused by the negligence of defendant therein, and in construing the section of the statute above quoted (viz: sec. 377, Cal. Code Civ. Proc.), the Supreme Court of California held that in an action brought by collateral heirs of a deceased person to recover damages on account of his death, the mere fact that they are such heirs does not tend to show pecuniary damage, and in the absence of other proof tending to show actual damages, or at least probable loss resulting to them from his death, the recovery must be limited to nominal damages. 'It is said the fact that a right to sue is given, implies that damages may be recovered, although no rights of plaintiff have been violated. Confessedly plaintiffs have no legal claim on deceased for anything and he owed no duty to them to accumulate an estate and leave it to them . . . the majority of men die without much property. Whether deceased would have succeeded in accumulating and if he had been successful, would have left it to plaintiffs, is matter of pure speculation. Such a guess as to probabilities is not, according to settled rules and maxims of the law, proper ground for the award of damages.'" Id., sec. 677, per DeHaven, Dist. J. The action was brought in this case by the administrator of the estate. Deceased, one Daly, was a fireman and was killed by explosion of drum of boiler on steamer. Brizzolane, another deceased, was 59 years old and life expectancy according to American table, was about 14 years, 9 months. Widow and five children, three of whom were minors, living at home, survived. He was in the coal business; annual income was $2,000 and his personal expenses were not less than $100 per month. $3,000 awarded. Daly (first above mentioned) was 42 years old. He left a wife and eight minor children, the eldest 16 years old. He was a fireman by occupation and wages were $45 a month. All of this went to his family with the exception of his necessary personal expenses, which were small. His life expectancy was 26 years and 9 months. $5,000 awarded. Blunt, another of those killed, was a passenger, was 47 years old. He was a laborer, industrious and in good health, and was employed at the usual rate of wages paid for unskilled labor, and at the time of his death was receiving $1 per day and board. His life expectancy was 23 years and he left surviving him a wife and four children.

ceased was thirty-two years old and in first-class health. He had been married some five and one half years, and was the father of three children, one of whom also lost her life in the disaster. Deceased was in the dairy business and owned some property, real and personal. He supported himself and family, including his father and sister-in-law. The family expenses were from seventy-five to one hundred dollars a month, and the decedent made from fifty to seventy-five dollars a month over said expenses, so that his yearly earnings at that rate would be about fifteen hundred to twenty-one hundred dollars. There was five hundred dollars on his person when he was drowned, which was missing when his body was found. Testimony was offered to show that to purchase an annuity of fifteen hundred dollars, on a male person thirty-two years of age and in good health, would require twenty-four thousand eight hundred and eighty-two dollars in cash. The court said: "There are, however, considerations involved in determining the value of a life not embraced within the annuity tables.[19] In fourteen states these considerations have found expressions in statutes limiting the amount that may be recovered for the death of a person to five thousand dollars, and in two states and one territory the law limits the amount to ten thousand dollars. There is no limitation in this state. Section 377 of the Code of Civil Procedure provides that 'such damages may be given as under all the circumstances of the case may be just.' The statutes of those states which fix a limit have been noticed by the courts in other states and have had weight in fixing the amount of damages."[20] The court fur-

$2,700 awarded. Tulan, another of those killed, was the master of the steamer. He was 48 years old and in good health. His life expectancy was 26 years. Two brothers and two sisters and no other heirs were left surviving. It was stipulated that all said brothers and sisters were over 21 years of age, but whether older or younger than deceased did not appear. He had been employed by the petitioner for seven years as a master at a salary of $115 a month. Whether his earnings exceeded his expenditures and whether he was provident or improvident did not appear. No recovery because the evidence did not show that any pecuniary loss had been sustained.

[19] Citing Morgan v. Southern Pac. Co., 95 Cal. 521; 30 Pac. 601; Cheatham v. Red River Line, 56 Fed. 248; In re Humboldt Lumber Mfrs. Assn., 60 Fed. 428.

[20] The Oceanic-Smith v. Occidental & O. S. S. Co. (U. S. C. C. N. D. Cal.), 61 Fed. 339. Damages of $10,000 were awarded by the court.

ther said: "The supreme court in this state[21] held that in an action by the parent to recover damages for the death of a minor child caused by negligence, the main element of damages is the probable value of the services of deceased during minority. Manifestly there is no rule which will enable the court to estimate with any degree of accuracy the probable value of the services of a child. But as the statute gives a right of action for the benefit of the parent without regard to the circumstances, I must determine that there is some injury which I fix in the sum of one thousand dollars."[22]

§ 728. Same subject continued.—Under another decision the clause "such damages," etc., as "may be just" "as was said by Justice De Haven in Morgan v. Southern Pac. Co.,[23] means 'that such damages are to be measured by what shall fairly seem the pecuniary injury or loss to the plaintiff.' Consideration should, therefore, be had to the uncertainty of continuous or regular employment and the probable physical capacity to continue to earn wages for any certain number of years. Moreover, the gross earnings of the head of a family do not always indicate his value in providing for the support of others. His calling may require personal expenditures or his habits or mode of life may be extravagant. These and other elements that might be mentioned make the productive value of a man's life extremely uncertain and beyond any estimate contained in the annuity tables."[24] Again, it is declared that "the method of estimating the pecuniary damages in cases of this character is somewhat problematical and depends to a great extent upon the sound judgment of the jurors of what would be reasonable, just and proper under all the circumstance, taking into

The deceased child in this case was over four and one half years old and in good health. *Quære.* To allow statutory limitation of amount of damages in other states to govern is to insert a clause in the statute which the legislature did not intend. Can this be done within the law? Per the authors, J. A. J. & H. C. J.

[21] In Morgan v. Southern Pac. Co., 95 Cal. 510; 30 Pac. 603.

[22] Per Morrow, Dist. J., in the Oceanic (above cited).

[23] 95 Cal. 521; 30 Pac. 603.

[24] In re Humboldt Lumber Mfrs. Assn. (U. S. C. C. N. D. Cal.), 60 Fed. 428, 444, per Morrow, Dist. J., citing Kelley v. Railroad, 48 Fed. 663; Cheatham v. Red River Line, 56 Fed. 248.

consideration the age of deceased, his condition of health, his employment and reasonable expectation of life."[25]

§ 729. Same subject concluded.—In a decision in the state court of California, in an action brought for the death of a son killed by contact with an electric wire improperly insulated, the court said: "In enlightening the jury as to the measure of damages, the court said: 'That is to say you are to ascertain here what amount, if any, this party contributed to the care and support of the plaintiff here, his mother; not the amount which he earned, as counsel properly stated, but the amount which he contributed to her support and care, and in estimating that amount, as previously stated, you may take into consideration his health, physical ability to labor and his habits, and in addition to that the law has also said that you may award damages in compensation for the loss of his society.' We have been cited to no case where the law says, 'Damages may be awarded for the loss of society.' As we read and understand the law, it says directly to the contrary. It is essentially and alone pecuniary loss to the parent which he may recover in damages for the death of his child. In Pepper v. Southern Pac. Co.,[26] the following instruction was declared erroneous, 'that the measure of damages is not alone the pecuniary loss and injury sustained by the plaintiff in the loss of his son, as just explained, but in assessing the damages you may, in addition, take into consideration the loss, if any, sustained by plaintiff in being deprived of the comfort, society and protection of the deceased by reason of his death.' In Lange v. Schoettler,[27] it is said: 'It is true in the case of a mother or a wife, the jury have been allowed to consider the fact that they were deprived of the comfort, society and protection of a son or husband, but it has always been held that this was in strict accordance with the rule that only the pecuniary value of the life to the relatives could be recovered.' In Harrison v. Sutter St. Ry. Co.,[27a] we find this language: 'While the jury have the right in such a case to consider the loss suffered by the widow in being deprived

[25] Southern P. R. Co. v. Lafferty (U. S. C. C. A. 9th C.) (S. D. Cal.), 57 Fed. 536, 544, per Lacombe, Cir. J.

[26] 105 Cal. 401.

[27] 115 Cal. 391.

[27a] 116 Cal. 156.

of the comfort, society and protection of her husband, they can regard these things only for the purpose of fixing the pecuniary value of his life. The instruction here was calculated to lead the jury into the error of supposing that they could, on this account, add something more than pecuniary loss.' It may well be said in this case that the instruction was calculated to lead the jury in fixing the amount of the verdict to add something more than pecuniary loss.[28] When a jury is told that in making up a verdict, it may award damages in compensation for the loss of the society of the deceased, it can only mean what the language so plainly imports and that is, damages may be awarded for the mere loss of society, regardless of any actual pecuniary loss."[29] In another frequently cited decision it was said that proof of killing of deceased and the negligence of defendant would justify nominal damages, 'but how much more? . . . It is evident that there must be some evidence showing that had deceased lived there would have accrued to the next of kin some property, or there was a strong probability he would or might have been of some pecuniary benefit to them.

[28] See also Green v. Southern Pac. Co., 122 Cal. 563; Morgan v. Southern Pac. Co., 95 Cal. 510; 29 Am. St. Rep. 143.

[29] Wales v. Pacific Elec. Motor Co., 130 Cal. 521, 523; 62 Pac. 932, 1120, per Garoutte, J. In department. Beatty, Ch. J., dissented from the order denying a rehearing in banc and declared that the case of Beeson v. Green Mountain Co., 57 Cal. 20, had never been overruled, and that if it was to be done, it should be done by the court in banc, plainly and unequivocally, so that there might thereafter be some certain guide in giving instructions as to the elements of damages in cases of this character. "In the Beeson case it was held that in estimating the pecuniary damages to the plaintiff, the jury could consider two elements—loss of support and loss of society—and an instruction of the trial court to that effect was sustained. In this case the instruction for the giving of which the judgment is reversed states the same identical proposition and nothing more. In this respect it differs in the same way and to the same extent that the Beeson case differs from the cases cited as authority in the opinion of the court. In every one of those cases it was held, and with some reason, that the instruction complained of told the jury that in addition to the pecuniary damage to the plaintiff, they could award damages for the loss of society. The charge here does not bear that construction. It merely tells the jury what the two elements of damage in such cases are. . . . As to the Beeson case, it may or it may not lay down the correct doctrine. . . . I think the doctrine of the court on this point ought to be made clear."

Nothing is allowed simply for the death of the deceased separated from the pecuniary loss his widow or next of kin may suffer on account thereof. What was the evidence in this case upon which the jury based its verdict so far as damages were concerned? Plaintiff testified that Niels Serensen was his cousin; that he had a sister and two brothers living in Denmark. There was some evidence that the deceased was a bridge carpenter and received about two dollars per day wages; that he had been working at this calling some three or four months, and that he had sent some money to his sister, but how much did not appear. There was no evidence as to his age or as to his capacity for earning or saving money. There was nothing to show what the kin of the deceased might reasonably have expected in a pecuniary way from his estate had he lived any longer. The jury found a verdict for one thousand seven hundred and fifty dollars damages." The verdict was not sustained and a new trial was ordered.[30]

§ 730. "Such damages" "as under all the circumstances of the case may be just"—Pecuniary loss.[31]—In California the cases decided under the early statute and those under the later enactment[32] necessarily present a different rule as to the measure of damages, since the prior enactment did not confine the recovery to pecuniary loss, but expressly allowed other damages. In that state in an action by the husband and minor children for the death of the wife and mother, the measure of damages, as given to the jury, was the pecuniary loss sustained, and an allowance for the probable loss of any pecuniary benefit.[33] So in another case an instruction was approved which directed the jury to give a verdict based upon net earnings, age, etc.,[34] which would pecuniarily compensate the heirs.[35]

[30] Serensen v. Northern Pac. R. Co. (U. S. C. C. D. Mont.), 45 Fed. 407, 410–412, per Knowles, J.

[31] See opinions in secs. 727–729, herein.

[32] See sec. 725, herein.

[33] Redfield v. Oakland Consol. St. R. Co., 110 Cal. 277; 42 Pac. 822, case was modified, 110 Cal. 287; 42 Pac. 1063; Redfield v. Oakland Consol. St. R. Co., 112 Cal. 220; 43 Pa. 1117.

[34] See secs. 727–729, 733, herein.

[35] Harrison v. Sutter St. R. Co., 116 Cal. 156; 47 Pac. 1019; 1 Am. Neg. Rep. 403. See sec. 733, herein, for opinion in this case.

And by a decision earlier in time than those above considered, the court limited the recovery to the pecuniary loss only, where the action was for a relative's death.[36] But a direction to the jury to confine their verdict to the pecuniary damage suffered, does not cure a prior instruction which clearly conveyed the impression that they might assess the damages upon a basis outside of and beyond that solely of mere pecuniary loss.[37] So in case of the death of an adult son, the pecuniary loss only can be recovered.[38] In an earlier case, however, the recovery was not confined to the pecuniary loss, in an action in behalf of a mother for her son's death, although recovery for what are known as sentimental damages was limited.[39] In Utah the measure of damages is also the pecuniary loss sustained.[40]

§ 731. "Such damages" "as under all the circumstances of the case may be just"—Exemplary damages.—Exemplary damages cannot be given. The early California statute, however, expressly provided therefor,[41] nor can such damages be awarded

[36] Morgan v. Southern P. Co., 95 Cal. 510; 30 Pac. 603; 17 L. R. A. 71; 29 Am. St. Rep. 143; 54 Am. & Eng. R. Cas. 101.

[37] Green v. Southern Pac. Co., 122 Cal. 563; 55 Pac. 577; 13 Am. & Eng R. Cas. N. S. 511.

[38] Pepper v. Southern Pac. Co., 105 Cal. 389; 38 Pac. 974.

[39] Munro v. Pacific Coast D. & R. Co., 84 Cal. 515; 24 Pac. 303. See sec. 735, herein. For earlier cases, see Cleary v. City R. Co., 76 Cal. 240; 18 Pac. 249; Nebraska v. Central Pac. R. Co., 62 Cal. 320; Cook v. Clay St. H. R. Co., 60 Cal. 604; McKeever v. Market St. R. Co., 59 Cal. 294; Beeson v. Green M. G. M. Co., 57 Cal. 20; Durkee v. Central P. R. Co., 56 Cal. 388; 45 Am. Rep. 59; Taylor v. Western P. R. Co., 45 Cal. 323; Myers v. San Francisco, 42 Cal. 25. See secs. 725, 731, 743, herein.

[40] English v. Southern P. Co., 13 Utah, 407; 45 Pa. 47; 35 L. R. A. 155; 4 Am. & Eng. R. Cas. N. S. 63, a case of death of a man 33 years old, leaving a widow and seven children. But see Wells v. Denver & R. G. W. R. Co., 7 Utah, 482; 27 Pac. 688; Webb v. Denver & R. G. W. R. Co., 7 Utah, 17; 24 Pac. 616.

[41] See secs. 725, 730, 735, herein. Lange v. Schoettler, 115 Cal. 388; 47 Pac. 139. See Morgan v. Southern Pa. Co., 95 Cal. 510; 30 Pac. 603; 17 L. R. A. 71; 54 Am. & Eng. R. Cas. 101; 29 Am. St. Rep. 143. Exemplary damages by way of punishing defendant in actions for the breach of an action not arising from contract may be allowed in addition to actual damages where the defendant has been guilty of oppression, fraud or malice express or implied. Stats. & amd'ts to Codes of Cal. 1891, p. 421, amd'g sec. 3294, Cal. Civ. Code; English v. Southern Pa. Co., 13 Utah, 407; 45 Pac. 47; 35 L. R. A. 155; 4 Am. & Eng. R. Cas. N. S. 63; Wells v. Denver & R. G. W. R. Co., 7 Utah, 482; 27 Pac. 688.

on the ground that the death was wantonly, cruelly or maliciously caused.[42]

§ 732. "Such damages" "as under all the circumstances of the case may be just"—Jury and instructions.[43]—Evidence should not be admitted which tends to excite the jury's sympathies and improperly influence their finding as to damages, and where such proof is given the verdict will not stand. And a subsequent correct charge as to the measure of damages for death caused by negligence, etc., does not cure a prior erroneous instruction, allowing recovery upon a different basis.[44] So a charge is properly refused which requires the jury to fix the pecuniary loss by reference to the mortality tables, where they are directed to limit the damages to the pecuniary injury.[45] Again, inconsistent and contradictory instructions are ground for reversal, as where the jury are directed to give such damages as they think plaintiff entitled to recover, and also such damages as under all the circumstances of the case may be just.[46] Nor should a charge be given, based upon elements of damage, concerning which there are no allegations nor proof.[47]

§ 733. "Such damages" "as under all the circumstances of the case may be just"—Factors generally to be considered.[48]—"All the circumstances of the case" means circumstances relevant and admissible under the pleadings, which are presented to the jury.[49] Evidence may be considered, therefore, as to deceased's age, sex,[50] mental and physical health and capacity; the general physical appearance as bearing upon the age; deceased's life expectancy and also that of the beneficiaries; his occupation, whether he was regularly employed or otherwise, and

[42] Lange v. Schoettler, 115 Cal. 388; 47 Pac. 139.

[43] See section 727, herein, and opinion.

[44] Green v. Southern Pac. Co., 122 Cal. 563; 55 Pac. 577; 13 Am. & Eng. R. Cas. N. S. 511.

[45] Redfield v. Oakland Consol. St. R. Co., 110 Cal. 277; 42 Pac. 822, case modified 110 Cal. 287; 42 Pac. 1063.

[46] Holt v. Spokane & P. R. Co. (Idaho), 35 Pac. 39.

[47] Holt v. Spokane & P. R. Co. (Idaho), 35 Pac. 39.

[48] See opinions secs. 727–729, herein.

[49] Holt v. Spokane & P. R. Co. (Idaho), 35 Pac. 39.

[50] As to age, etc., of survivors, see sec. 739, herein.

the probability of his work being interrupted by sickness or other cause; his skill and competency in his employment; his earnings, including probable future earnings; his earning capacity and the probability of its diminishing; his personal expenses, and probable accumulations, and the value of a deceased wife's and mother's services, her education and competency.[51]

[51] As to probable increase of estate, see Burk v. Arcata & M. R. R. Co., 125 Cal. 364; 57 Pac. 1065; 15 Am. & Eng. R. Cas. N. S. 769. Age, sex and health of minor was in evidence; also that he was bright, affectionate and obedient. Fox v. Oakland Consol. St. R. Co., 118 Cal. 55; 50 Pac. 25; 9 Am. & Eng. R. Cas. N. S. 825. "The evidence tended to show that deceased was about 69 years of age but his physical appearance would seem to have indicated more advanced years. Two physicians testified that he appeared to be 75 or 80 years of age, and one of them that he was a debilitated man. His widow testified that his health was very good. His income was about $110 a month on an average, as his business was that of an expert accountant, and he was not always employed. According to the Carlisle mortality tables, he had an expectancy or probable lease of life of a fraction over 9 years and a half. He had dependent upon him a wife and an adult unmarried daughter. Upon these facts the jury were instructed as to the question of damages in effect that they should estimate and determine the amount that the deceased would in all reasonable probability have earned in the years yet remaining to him, and deducting from this the amount which he would reasonably require for his own personal use and maintenance, give a verdict which would pecuniarily compensate the heirs. It is conceded that this instruction gave the correct rule for the guidance of the jury. We think that we would not be justified in holding that there was an abuse of discretion in setting aside the verdict. The jury would seem to have proceeded upon the theory that the deceased's expectancy of life would be fully realized and that he would continue to the end with the same earning capacity as that possessed by him at the time of his death, for their verdict implies that he would have earned over and above the amount required for his personal needs the large net sum of $8,000, and this would necessarily contemplate constant employment without interruption from sickness or other causes and with a rate of earnings in no way diminished, since it will readily be perceived that according to his income his utmost gross earnings in the given time would not have exceeded $12,000. Such a result does not accord with ordinary human experience. Under these circumstances we do not think it should be said that the conclusion of the trial judge was without support in the evidence." The court below granted a new trial on the ground that a verdict of $8,000 was excessive. Death was caused by collision by a car, on which deceased was a passenger, with a brewery wagon. Harrison v. Sutter St. R. Co., 116 Cal. 156; 47 Pac. 1019; 1 Am. Neg. Rep. 403, per Van Fleet, J. Deceased wife's and mother's life expectancy and that of her surviving husband was considered, although the life expectancy of

§ 734. "Such damages" "as under all the circumstances of the case may be just"—Suffering of person injured.[52]—In determining this question as to recovery for the sufferings of the person injured, the point is important whether the action is for the death loss or a survival action.[53] But under the death loss act in California, the recovery is only for the loss occasioned by the negligent or wrongful killing and should not, it would seem, include the sufferings of the injured person.[54] So the damages are limited to the injuries inflicted upon the plaintiff or beneficiaries by reason of the death, and do not include matters personal to deceased.[55]

§ 735. "Such damages" "as under all the circumstances of the case may be just"—Solatium—Mental suffering, loss of society, etc.[56]—No allowance can be made for grief, sorrow or mental anguish,[57] nor for the loss sustained by being de-

each of the plaintiffs was not brought into the calculation, and an instruction was therefore held properly refused, which made the recovery depend upon the present worth to plaintiffs of deceased's life or which authorized a recovery with reference to the present value of life according to the mortality tables. The wife was educated and competent and did all her own work. Redfield v. Oakland Consol. R. Co., 110 Cal. 277; 42 Pac. 822, modified 110 Cal. 287; 42 Pac. 1063. The age of a deceased son was a factor. Pepper v. Southern P. Co., 105 Cal. 389; 38 Pac. 974. Deceased was a son 23 years old, of good habits. O'Callaghan v. Bode, 84 Cal. 489; 24 Pac. 269. Earnings, care and health are important. Deceased was 38 years old, in good health and earning $50 a month. English v. Southern P. Co., 13 Utah, 407; 45 Pac. 47; 35 L. R. A. 155; 4 Am. & Eng. R. Cas. N. S. 63. Evidence is admissible that deceased employee was a good railroad man. Wells v. Denver & R. G. W. R. Co., 7 Utah, 482; 27 Pac. 688. Deceased was a man 28 years old, of robust health and earned $1.75 a day —$4,995 not excessive. Webb v. Denver & R. G. R. Co., 7 Utah, 17; 26 Pac. 981.

[52] See opinions, sec. 727, herein.

[53] See also Mason v. Union P. R. Co. (Utah), 24 Pac. 796; 44 Am. & Eng. R. Cas. 429. Cal. Stat. gives a new right of action. Armstrong v. Beadle, 5 Sawy. (C. C. D. Cal.) 484. As to survival, see Mont. Comp. Stat. 1887, sec. 22; Rev. Stat. Idaho, 1887, sec. 4055, subs. 4; Rev. Stat. Utah, 1898, p. 638, sec. 2878.

[54] Examine Cleary v. City R. Co., 76 Cal. 240; 18 Pac. 249. As to survival, see Cal. Code Civ. Proc. 1899, secs. 335, 339, 385.

[55] Lange v. Schoettler, 115 Cal. 388; 47 Pac. 139. Does not include injuries personal to child in action for his death. Durkee v. Central P. R. Co., 56 Cal. 388; 45 Am. Rep. 59.

[56] See opinions, secs. 727, 729, herein.

[57] Redfield v. Oakland Consol. St.

prived of the comfort, society and protection of decedent.[58] In Idaho an instruction which directs the consideration of the loss of deceased's society as an element of damages for the death of an infant son is erroneous where no claim is made therefor in the complaint and there is no proof of social relations.[59] It is decided, however, that there can be a recovery for the pecuniary loss sustained for the loss of the society, comfort and protection of a minor child.[60]

§ 736. "Such damages" "as under all the circumstances of the case may be just"—Relations, legal and actual, to beneficiaries—Support and dependency.[61]—The relations, legal and actual, which the deceased sustained to the beneficiaries will be considered, including in certain cases their dependency and his contributions to their support, although whatever legal liability exists does not constitute the sole basis of damages, for as we have elsewhere stated, the reasonable expectation of pecuniary benefit is a most important consideration. Thus deceased's care and his beneficent and pecuniary contributions given and reasonably likely to be given to the beneficiaries are elements of the pecuniary loss,[62] although the dependency of

R. Co., 110 Cal. 277; 42 Pac. 822, case was modified, 110 Cal. 287; 42 Pac. 1063. Deceased was a wife and mother. Redfield v. Oakland Consol. St. R. Co., 112 Cal. 220; 43 Pac. 1117; Munro v. Pacific Coast D. & R. Co., 84 Cal. 515; 24 Pac. 303. Deceased child. Wells v. Denver & R. G. W. R. Co., 7 Utah, 482; 27 Pac. 688; Webb v. Denver & R. G. W. R. Co., 7 Utah, 17; 24 Pac. 616; 44 Am. & Eng. R. Cas. 683. Mother for death of son under 2. Utah, Comp. Laws, 1888, sec. 3178. See Morgan v. Southern P. Co., 95 Cal. 510; 30 Pac. 603; 17 L. R. A. 71; 29 Am. St. Rep. 143; 54 Am. & Eng. R. Cas. 101. See sec. 730 herein as to pecuniary loss. Contra Cleary v. City R. Co., 76 Cal. 240; 18 Pac. 249. Death of infant.

[58] Green v. Southern P. Co., 122 Cal. 563; 55 Pac. 577; 13 Am. & Eng. R. Cas. N. S. 511. Not in addition to the pecuniary injury, but comfort, etc., is evidence of the pecuniary loss. Pepper v. Southern P. Co., 105 Cal. 389; 38 Pac. 974. Deceased was adult son. Contra Munro v. Pacific Coast D. & R. Co., 84 Cal. 515; 24 Pac. 303. Deceased child. Cook v. Clay St. H. R. Co., 60 Cal. 604; Beeson v. Green Mountain Co., 57 Cal. 20; Wells v. Denver & R. G. W. R. Co., 7 Utah, 482; 27 Pac. 688; Webb v. Denver & R. G. W. R. Co., 7 Utah, 17; 24 Pac. 616; 44 Am. & Eng. R. Cas. 683. See sec. 725, 727–729, herein.

[59] Holt v. Spokane & P. R. Co. (Id.), 35 Pac. 39.

[60] Beaman v. Martha Wash. Min. Co. (Utah, 1901), 63 Pac. 631.

[61] See opinions secs. 727, 729, herein.

[62] English v. Southern P. Co., 13 Utah, 407; 45 Pac. 47; 35 L. R. A.

beneficiaries in the sense of their wealth or poverty is immaterial as an abstract proposition.[63] But the fact will be considered that a deceased adult son was the sole support of his mother and her minor children, and also the proportion or amount of his wages which he contributed thereto is a factor in determining whether or not the damages awarded are excessive.[64] So the amount contributed by deceased to the support of his wife and children is an element of their pecuniary loss sustained by his death,[65] and the manner in which decedent treated his family is a factor.[66] The jury may under an early California decision also consider the social and domestic relations of the parties and their kindly demeanor towards each other, but not for awarding damages by way of solace.[67] So the actual relations between a parent and child in so far as they affect their mental and physical well-being in their bringing up may, when coupled with the parents' ability to so aid them be considered.[68] And the fact that an unmarried daughter was living with deceased may, in connection with other elements, be of some importance.[69] But a charge to consider social relations should not be given where there are neither allegations nor proof thereof.[70]

§ 737. "Such damages" "as under all the circumstances of the case may be just"—Reasonable expectation of pecuniary benefit.[71]—The reasonable expectation of pecuniary benefit may be based upon a reasonable probability only, of deceased's earnings during what would probably have been the

155; 4 Am. & Eng. R. Cas. N. S. 63. As to dependency being a factor, see Pool v. Southern P. Co. (Utah), 26 Pac. 254.

[63] English v. Southern P. Co., cited last preceding note. See sec. 736, herein.

[64] O'Callaghan v. Bode, 84 Cal. 489; 24 Pac. 269. See secs. 749, 750, herein.

[65] English v. Southern P. Co., 13 Utah, 407; 45 Pac. 47; 35 L. R. A. 155; 4 Am. & Eng. R. Cas. N. S. 63.

[66] Chilton v. Union P. R. Co., 8 Utah, 47; 29 Pac. 903.

[67] Beeson v. Green, M. G. M. Co., 57 Cal. 20.

[68] Redfield v. Oakland Consol. St. R. Co., 110 Cal. 277; 42 Pac. 822; case modified, 110 Cal. 287; 42 Pac. 263; Redfield v. Oakland Consol. St. R. Co., 112 Cal. 220; 43 Pac. 1117.

[69] This fact was briefly noted, thus showing that it was in evidence in Green v. Southern P. Co., 122 Cal. 563; 55 Pac. 577; 13 Am. & Eng. R. Cas. N. S. 511.

[70] Holt v. Spokane & P. R. Co. (Id.), 35 Pac. 39.

[71] See opinion sec. 727, herein.

remaining years of his life, having in view his net and not his gross earnings, and the chances of diminishing earning capacity and interrupted employment.[72] But the mere possibility of probable accumulations and receipt thereof by the heirs will not justify substantial damages.[73] Again, in case of the killing of a mother the deprivation of a pecuniary benefit to the children may be considered,[74] and the family may recover what it had been accustomed to receive or reasonably expected to receive from deceased.[75]

§ 738. "Such damages" "as under all the circumstances of the case may be just"—Prospect of inheritance.—The possibility of inheritance when remote will not justify substantial damages.[76]

§ 739. "Such damages" "as under all the circumstances of the case may be just"—Physical and financial condition—Age of beneficiaries, number of family, etc.—In California it cannot be shown that deceased's daughter, who was living with him at the time of his death, had no property of her own upon which to maintain herself.[77] And in Utah neither the poverty nor wealth of the giver, nor of the recipient is a basis for the admeasurement of damages,[78] although where children are parties to the action their numbers, ages and names may be proven.[79] This question, however, is involved with that of de-

[72] Harrison v. Sutter St. R. Co., 116 Cal. 156; 47 Pac. 1019; 1 Am. Neg. Rep. 403, per Van Fleet, J. See sec. 733, herein, for opinion in this case. See secs. 733, herein, for general factors.

[73] Burk v. Arcata & M. R. R. Co., 125 Cal. 364; 57 Pac. 1065; 15 Am. & Eng. R. Cas. N. S. 769.

[74] Redfield v. Oakland Consol. St. R. Co., 110 Cal. 277; 42 Pac. 822, case was modified, 110 Cal. 287; 42 Pac. 1063; Redfield v. Oakland Consol. St. R. Co., 112 Cal. 220; 43 Pac. 1117; Munro v. Pacific Coast D. & R. Co., 84 Cal. 515; 24 Pac. 303.

[75] Pool v. Southern P. R. Co. (Utah), 26 Pac. 654; English v. Southern P. Co., 13 Utah, 407; 45 Pac. 47; 35 L. R. A. 155; 4 Am. & Eng. R. Cas. N. S. 63.

[76] Burk v. Arcata & M. R. Co., 125 Cal. 364; 57 Pac. 1065; 15 Am. & Eng. R. Cas. N. S. 769.

[77] Green v. Southern P. R. Co., 122 Cal. 563; 35 Pac. 577; 13 Am. & Eng. R. Cas. N. S. 511.

[78] English v. Southern P. Co., 13 Utah, 407; 45 Pac. 47; 35 L. R. A. 155; 4 Am. & Eng. R. Cas. N. S. 63.

[79] English v. Southern P. Co., 13 Utah, 407; 45 Pac. 47; 35 L. R. A. 155; 4 Am. & Eng. R. Cas. N. S. 63; Chilton v. Union P. R. Co., 8 Utah, 47; 29 Pac. 903. See also Pool v. Southern P. R. Co. (Utah), 26 Pac.

pendency and contribution to support which is considered under another section.[80]

§ 740. "Such damages" "as under all the circumstances of the case may be just"—Probable accumulations.—The surplus earnings of deceased over his personal expenditures are a material factor;[81] but where the probability of additions to his estate is a question of remote benefit to the heirs as such, it will not be a basis of substantial damages.[82]

§ 741. "Such damages" "as under all the circumstances of the case may be just"—Expenses of sickness, funeral, etc. —Medical expenses for sickness occasioned by the tort, and funeral expenses, are elements of damages.[83]

§ 742. "Such damages" "as under all the circumstances of the case may be just"—Life expectancy and mortality tables.—We have seen that life expectancy is an element of damages.[84] Mortality tables may also be used to determine such expectancy.[85]

§ 743. "Such damages" "as under all the circumstances of the case may be just"—Nominal damages.[86]—The theory

654. Examine O'Callaghan v. Bode, 84 Cal. 489; 24 Pac. 269, where $3,000 was held not excessive in favor of a widowed mother and her minor children, the question of dependency being, it will be observed, noted as a factor. In Redfield v. Oakland Consol. St. R. Co., 110 Cal. 277; 42 Pac. 822, the number and ages of minor children were considered in a case of death of the wife and mother —$14,000 held not clearly excessive. In Harrison v. Sutter St. R. Co., 116 Cal. 156; 47 Pac. 1019; 1 Am. Neg. Rep. 403, it was in evidence that deceased left a wife and adult unmarried daughter. See sec. 733, herein, for opinion in this case.

[80] See sec. 736, herein.

[81] Harrison v. Sutter St. R. Co., 116 Cal. 156; 47 Pac. 1019; 1 Am. Neg. Rep. 403. See sec. 733, herein, for opinion in this case. See opinions, sec. 727, herein.

[82] Burk v. Arcata & M. R. R. Co., 125 Cal. 364; 57 Pac. 1065; 15 Am. & Eng. R. Cas. N. S. 769.

[83] Cleary v. City R. Co., 76 Cal. 240; 18 Pac. 249. Examine Gay v. Winter, 34 Cal. 153; this case holds that such damages must be specifically averred.

[84] See sec. 733, herein.

[85] The Carlisle mortality tables were used in a California case, although this fact is merely stated and there is no discussion as to their admissibility. Harrison v. Sutter St. R. Co., 116 Cal. 156; 47 Pac. 1019; 1 Am. Neg. Rep. 403. See opinion in this case, under sec. 733, herein.

[86] See opinions, secs. 727, 729, herein.

of probable increase of his estate by deceased and that the heirs would probably have received the same is not sufficient to justify an award of substantial damages.[87] But where nominal damages are inadequate, and such damages are not sufficient for a death loss, the verdict will be reversed.[88]

§ 744. "Such damages" "as under all the circumstances of the case may be just"—Death of husband—Husband and father.[89]—The measure of damages for the death of a husband or of a husband and father depend as to their amount upon the facts and circumstances of each particular case, such as age, earnings, etc.,[90] reasonable expectation of pecuniary benefit,[91] and other factors considered under particular headings herein. The chief consideration, however, is that the compensation must be "just" in view of the pecuniary loss, although there is no express provision which limits the damages to the pecuniary injury.[92] Under an early California decision, the death of the widow before trial excludes her right to damages, but the question remains as to the amount to be awarded to the children.[93]

§ 745. "Such damages" "as under all the circumstances of the case may be just"—Death of wife.—Where the surviving husband has minor children, the wife's education and competency to instruct them, and the fact that she did all her own work will be competent evidence, and in such case, although the right of action is given to the heirs, the husband may recover as to his pecuniary injuries as an individual, but the damages are not his community property within the Code of

[87] Burk v. Arcata & M. R. R. Co., 125 Cal. 364; 57 Pac. 1065; 15 Am. & Eng. R. Cas. N. S. 769.

[88] Wolford v. Lyons G. G. M. Co., 63 Cal. 483.

[89] See opinion, sec. 727, herein.

[90] See sec. 733, herein.

[91] See sec. 737, herein.

[92] See secs. 725, 730, 731, 735, 736, herein.

[93] Taylor v. Western P. R. Co., 45 Cal. 323. See as to measure of damages for death of husband or of husband and father, Beeson v. Green Mountain Co., 57 Cal. 20; Linden v. Anchor Min. Co., 20 Utah, 134; 58 Pac. 355; English v. Southern P. Co, 13 Utah, 407; 45 Pac. 47; 35 L. R. A. 155; 4 Am. & Eng. R. Cas. N. S. 63; Chilton v. Union P. R. Co., 8 Utah, 47; 29 Pac. 903; Pool v. Southern P. R. Co. (Utah), 26 Pac. 654; Wells v. Denver & R. G. W. R. Co., 7 Utah, 482; 27 Pac. 688. These cases are fully considered elsewhere herein.

California, which provides that upon the wife's death the entire community property belongs to the surviving husband.[94]

§ 746. "Such damages" "as under all the circumstances of the case may be just"—Death of parent.—In case of the death of a mother the surviving children are entitled to recover for the probable loss of any pecuniary benefit which they might have received except for the killing.[95] And although the husband survives, yet the children, if any, are entitled to the benefit of the action.[96] Nor does the fact that the widow who survives the husband, dies before trial, preclude their recovery of compensation for the father's death.[97]

§ 747. "Such damages" "as under all the circumstances of the case may be just"—Death of parent—Care, training, etc., of children.—The pecuniary loss to children may include the loss of care and training by the parent, at least where the evidence shows that the parent is educated and competent to confer such benefit.[98]

§ 748. "Such damages" "as under all the circumstances of the case may be just"—Death of parent—Minority and majority of children.—The children's deprivation of pecuniary advantage after minority is not an improper factor to be considered in the award of damages for a mother's death, for the child's interest does not necessarily determine upon his reach-

[94] Redfield v. Oakland Consol. St. R. Co., 110 Cal. 277; 42 Pac. 822, case was modified 110 Cal. 287; 42 Pac. 1063. See Cal. Civ. Code, sec. 1401, as to community property. see Redfield v. Consol. St. R. Co., 112 Cal. 220; 43 Pac. 1117. As to right to recover for mental suffering, loss of society, etc., see sec. 735, herein. As to factors generally, see sec. 733, herein.

[95] Redfield v. Oakland Consol. St. R. Co., 110 Cal. 277; 42 Pac. 822, case modified 110 Cal. 287; 42 Pac. 1063. See also Redfield v. Oakland Consol. St. R. Co., 112 Cal. 220; 43 Pac. 1117.

[96] See case cited last preceding note.

[97] Taylor v. Western P. R. Co., 45 Cal. 323. As to other factors see secs. 733, 736, 747, 748, herein, as to factors generally — support — legal, etc., relations—training—ages and number—minority and majority in case of death of parent.

[98] Redfield v. Oakland Consol. St. R. Co., 112 Cal. 220; 43 Pac. 1117; Redfield v. Oakland Consol. St. R. Co., 110 Cal. 277; 42 Pac. 822; case was modified, 110 Cal. 287; 42 Pac. 1063.

ing majority,[99] although it is also determined that the time when the minority of infant plaintiffs would cease should be brought into the calculation.[100]

§ 749. "Such damages" "as under all the circumstances of the case may be just"—Death of child.[1]—Damages cannot be awarded for the death of a child drowned in a pond on private premises when he had gone there without invitation.[2] And the fact that death was wantonly, cruelly or maliciously inflicted will not justify punitive damages in behalf of a father for his son's killing;[3] nor will a mother's mental pain and suffering;[4] nor the loss of an adult son's society, comfort and protection be considered.[5] But the loss of support to a mother is a factor,[6] and that a deceased adult son was the sole support of his mother and her minor children is important in determining whether or not the damages awarded are excessive,[7] for a mother is entitled to recover her pecuniary loss for her child's death,[8] although such pecuniary injury limits the recovery for an infant's killing.[9] In estimating the damages for the loss of a child of tender years, the facts that he was ordinarily bright, affectionate, obedient and healthy are material.[10] Again, in case of a minor child, the loss of the child's services up to majority should be considered in an action by the father.[11] But the loss of services need not

[99] Redfield v. Oakland Consol. St. R. Co., 110 Cal. 277; 42 Pac. 822; case was modified 110 Cal. 287; 42 Pac. 1063. See Redfield v. Oakland Consol. St. R. Co., 112 Cal. 220; 43 Pac. 1117.

[100] Same case, 110 Cal. 287; 42 Pac. 1063.

[1] See opinions secs. 727, 729, herein.

[2] Peters v. Bowman, 115 Cal. 345; 1 Am. Neg. Rep. 4.

[3] Lange v. Schoettler, 115 Cal. 388; 47 Pac. 139.

[4] Webb v. Denver & R. G. W. R. Co., 7 Utah, 17; 24 Pac. 616; 44 Am. & Eng. R. Cas. 683.

[5] Pepper v. Southern P. Co., 105 Cal. 389; 38 Pac. 974. See sec. 735, herein.

[6] Munro v. Pacific Coast D. & R. Co., 84 Cal. 515; 24 Pac. 303.

[7] O'Callaghan v. Bode, 84 Cal. 489; 24 Pac. 269. See sec. 736, herein.

[8] Munro v. Pacific Coast D. & R. Co., 84 Cal. 515; 24 Pac. 303.

[9] Morgan v. Southern P. Co., 95 Cal. 510; 30 Pac. 603; 17 L. R. A. 71; 29 Am. St. Rep. 143; 54 Am. & Eng. R. Cas. 101. See sections herein as to pecuniary loss statutes, exemplary damages—solatium.

[10] Fox v. Oakland Consol. St. R. Co., 118 Cal. 55; 50 Pac. 25; 9 Am. & Eng. R. Cas. N. S. 825, a case where deceased was a boy 4½ years old—$6,000 held excessive. See sec. 733, herein.

[11] Cleary v. City R. Co., 76 Cal. 240; 18 Pac. 249.

be specially alleged where such loss naturally and necessarily results from the death,[12] although in Idaho an instruction may, it is decided, be refused which fixes the measure of damages as the value of the deceased minor's services until he becomes of age, less the expenses of his support during that time.[13]

§ 750. "Such damages" "as under all the circumstances of the case may be just"—Death of child—Minority and majority.—Damages for the death of a child are not limited to his minority, but include a reasonable expectation of pecuniary benefit thereafter.[14]

§ 751. "Such damages" "as under all the circumstances of the case may be just"—Collateral relations.—There must be some evidence that brothers and sisters had some reasonable expectation that deceased's continued life would have been of some pecuniary advantage.[15]

§ 752. "Such damages" "as under all the circumstances of the case may be just"—Defenses—Defendant's aid.—The fact of defendant's generosity in taking up a collection for the benefit of the widow is not admissible evidence in the absence of a plea of payment or release.[16]

[12] Morgan v. Southern P. R. Co., 95 Cal. 510; 30 Pac. 603; 17 L. R. A. 71; 54 Am. & Eng. R. Cas. 101; 29 Am. St. Rep. 143.

[13] Holt v. Spokane & P. R. Co. (Id.), 35 Pac. 39.

[14] Munro v. Pacific Coast D. & R. Co., 84 Cal. 515; 24 Pac. 303; Beaman v. Martha Washington Min. Co. (Utah, 1901), 63 Pac. 631.

[15] See opinions, secs. 727, 729, herein.

[16] Linden v. Anchor M. Co., 20 Utah, 134; 58 Pac. 355.

CHAPTER XXXII.

DEATH—"SUCH DAMAGES" AS THE JURY "SHALL DEEM FAIR AND JUST."

§ 753. "Such damages" as the jury "shall deem fair and just"—Statutes.
754. "Such damages" as to the jury "may seem fair and just"—Exemplary damages—Statute.
755. "Fair and just" damages—Factors generally to be considered.
756. "Fair and just" damages—Solatium—Mental suffering a factor.
757. "Fair and just" damages—Loss of society of deceased to wife or mother a factor.
758. "Fair and just" damages—Reasonable expectation of pecuniary benefit—Support.
759. "Fair and just" damages—Special damages—Physical condition of beneficiary—Proximate cause.
760. "Fair and just" damages—Number and ages of minor children.
761. "Fair and just" damages—Wife's death—Husband's improved habits and affairs—Pecuniary loss.
762. "Fair and just" damages—Death of minor child.
763. "Fair and just" damages—Death of adult child.
764. "Fair and just" damages—Care of family, education, etc., of children—Prospective damages.
765. Defenses—Mitigation—Insurance—Marriage and remarriage.

§ 753. "Such damages" as the jury "shall deem fair and just"—Statutes.—In West Virginia[1] and Wyoming[2] "the jury" "may give such damages as they shall deem fair and just," not exceeding ten thousand dollars in the first state, and in the latter not exceeding five thousand dollars.[3] The existence of the right of action under a survival statute,[4] and the

[1] Worth's Code, W. Va. 1899, p. 774; Code, ch. 103, sec. 6.

[2] Rev. Stat. 1899, secs. 3448–3449; Rev. Stat. 1887, sec. 2364b.

[3] In examining the West Virginia decisions it is important to note that under an earlier statute, the recovery was for the benefit exclusively of the widow and next of kin.

[4] See Rev. Stats. Wyom. 1887, secs. 2060, 2061, 2351, 2352.

parties to be benefited[5] are necessarily important factors in determining the amount of damages in these states.

§ 754. "Such damages" as to the jury "may seem fair and just"—Exemplary damages—Statute.—In Virginia[6] the jury "may award such damages as to it may seem fair and just," not exceeding ten thousand dollars. In determining, however, the measure of damages under this statute, the fact should be considered that where the party injured sues and dies from the injury, the action may be reviewed by the personal representative, and it is also important that the beneficiaries are the wife, husband, parent or child, if any, otherwise the damages go to the estate.[7] Under this enactment it is held that the jury is not limited to awarding damages for the pecuniary loss only,[8] even though it appears that deceased had been wilfully killed by defendant, but the recovery may include such damages as are "fair and just" or as the court declared, punitive and exemplary damages.[9]

§ 755. "Fair and just" damages—Factors generally to be considered.—The age, business capacity, experience and habits, health, energy and perseverance of deceased during his probable lifetime should be considered, and a sum fixed equal to his probable earnings, based on such factors, although this sum does not constitute the limit of damages to be awarded.[10]

[5] Worth's Code, W. Va. 1899, p. 774; Code, W. Va. ch. 103, sec. 6; Rev. Stats. 1899, sec. 3449; Rev. Stat. Wyom. 1887, sec. 2364b.

[6] Code, 1887, sec. 2903, am'd 1893, p. 83; Suppl't to Code, 1900, p. 314, sec. 2906. See Code, 1873, ch. 145.

[7] Code, 1887, secs. 2904, 2906. See Code, 1873, ch. 145.

[8] Simmons v. McConnell, 86 Va. 494; 14 Va. L. J. 106; 10 S. E. 838.

[9] Matthews v. Warner, 29 Gratt. (Va.) 570; 26 Am. Rep. 396.

[10] Baltimore & O. R. Co. v. Wightman, 29 Gratt. (Va.) 431; 26 Am. Rep. 384. See section 764, as to care and education of children. See also as to probable earnings, Baltimore & O. R. Co. v. Noell, 32 Gratt. (Va.) 394. Where an unmarried son lived with his mother and cared for her, the damages should be based upon his and her expectancy of life, and the amount of his probable earnings during such period. Baltimore & O. R. Co. v. Noell, 32 Gratt. (Va.) 394. Deceased was a colored farm laborer at the time of his death, without any special acquirements, having no trade of any kind, and at intervals worked in connection with a dairy, making, when so engaged, $25 per month, and at other times something more. He was 23 years

§ 756. "Fair and just" damages—Solatium—Mental suffering a factor.—Under this statutory provision for awarding "fair and just" damages, recovery may be had by way of a solatium or for the mental suffering occasioned by the loss through death. Thus such suffering constitutes a ground of recovery where an action is brought by a widowed mother for the killing of an unmarried son.[11]

§ 757. "Fair and just" damages—Loss of society of deceased to wife or mother a factor.—In so far as the wife or mother of deceased derived comfort and solace from his society, such factors are to be considered in awarding damages.[12]

§ 758. "Fair and just" damages—Reasonable expectation of pecuniary benefit—Support.—It is apparent from the cases considered under this rule of "fair and just" damages that it is necessarily implied that a reasonable expectation of pecuniary benefit from past support or otherwise constitutes an important element in ascertaining the amount of compensation to be awarded.[13] So it is decided that prospective losses such as would actually result as the proximate damages may be included.[14]

§ 759. "Fair and just" damages—Special damages—Physical condition of beneficiary—Proximate cause.—Although special damages, because of the physical condition of

of age, of good health, sober, industrious, and provided for his family, and left a widow, without children. Upon these facts, and taking into consideration all of the circumstances of the case, the court thinks an award of $1,200 should be made for libellant, in full of damages arising from the death of her intestate. The Elizabeth (U. S. D. C. E. D. Va.), 114 Fed. 757, 760.

[11] Baltimore & O. R. R. Co. v. Noell, 32 Gratt. (Va.) 394. See Matthew v. Warner, 29 Gratt. (Va.) 570; 26 Am. Rep. 396; Simmons v. McConnell, 86 Va. 494; 14 Va. L. J. 106; 10 S. E. 838. See generally as to distinction between injured feelings and mental sufferings. Chicago C. R. Co. v. Taylor, 170 Ill. 49.

[12] Matthews v. Warner, 29 Gratt. (Va.) 570; Baltimore & O. R. Co. v. Noell, 32 Gratt. (Va.) 394. Case of action by widow for death of unmarried son.

[13] Baltimore & O. R. Co. v. Noell, 32 Gratt. (Va.) 394; Baltimore & O. R. Co. v. Wightman, 29 Gratt. (Va.) 431; 26 Am. Rep. 384; Searles v. Kanawha & O. R. Co., 32 W. Va. 370; 9 S. E. 248; Turner v. Norfolk & W. R. Co. (W. Va.), 22 S. E. 83.

[14] Searles v. Kanawha & O. R. Co., 32 W. Va. 370; 9 S. E. 248.

the mother of plaintiff's intestate, can be recovered in Virginia without being alleged in the complaint, yet where there is no necessary and probable connection between the negligence occasioning the death and the nervous condition of the mother claimed to have caused an attack of bronchitis, the latter affords no ground for the recovery of damages.[15]

§ 760. "Fair and just" damages—Number and ages of minor children.—In Virginia the recovery is for the benefit of the wife, husband, parent and child, if any, otherwise the amount recovered is assets.[16] It would seem, therefore, that where the action is for the benefit of the widow or children that the number and ages of the surviving children would be admissible evidence.[17]

§ 761. "Fair and just" damages—Wife's death—Husband's improved habits and affairs—Pecuniary loss.—The jury may consider the husband's improved habits and pecuniary affairs since his marriage and are not limited in their award of damages to pecuniary loss merely.[18]

§ 762. "Fair and just" damages—Death of minor child.—In determining whether or not the damages awarded to a widowed mother for the killing of her minor son are excessive, the court will consider his age and the fact that he was strong, healthy, industrious and of average intelligence.[19]

§ 763. "Fair and just" damages—Death of adult child.—In case of an adult child's killing, the sum awarded a widowed mother as damages should equal his probable future earnings during the period of their joint lives, and the facts should be considered that the deceased was a son, unmarried, and that he lived with and cared for her and aided in her support. Her mental sufferings also constitute a factor.[20]

[15] Norfolk & W. Ry. Co. v. Stevens, 97 Va. 631; 34 S. E. 525; 46 L. R. A. 367.

[16] Code, Va. 1887, sec. 2904. See Code, 1873, ch. 145, sec. 9.

[17] Baltimore & O. R. Co. v. Sherman, 30 Gratt. (Va.) 602.

[18] Simmons v. McCornell, 86 Va. 494; 14 Va. L. J. 106; 10 S. E. 838.

[19] Turner v. Norfolk & W. R. Co. (W. Va.), 22 S. E. 83.

[20] Baltimore & O. R. Co. v. Noell, 32 Gratt. (Va.) 394.

§ 764. "Fair and just" damages—Care of family, education, etc., of children—Prospective damages.—In addition to a sum equal to the probable earnings of deceased, it is held under this "fair and just" rule that there should be awarded as damages the value of the services of deceased in the superintendence, attention to and care of his family and the education of his children, the loss of which has been occasioned by his death,[21] and this includes the nurture, instruction and physical, moral and intellectual training, which the father would have given to his children.[22]

§ 765. Defenses—Mitigation—Insurance—Marriage and remarriage.—Insurance on the life of deceased will not be considered in mitigation of damages,[23] nor will the fact that the husband is engaged to remarry.[24]

[21] Baltimore & O. R. Co. v. Wightman, 29 Gratt. (Va.) 431; 26 Am. Rep. 384.

[22] Searles v. Kanawha & O. R. Co., 32 W. Va. 370; 9 S. E. 248. See Dimmey v. Wheeling & Eg. R. Co., 27 W. Va. 32; 55 Am. Rep. 292.

[23] Baltimore & O. R. Co. v. Wightman, 29 Gratt. (Va.) 431.

[24] Dimmey v. Wheeling & Eg. R. Co., 27 W. Va. 32, cited in Gulf, Colo. & S. F. R. Co. v. Younger, 90 Tex. 387; 38 S. W. 1121; 3 Am. Neg. Rep. 378, to the point that remarriage cannot be considered in mitigation.

CHAPTER XXXIII.

"SUCH DAMAGES AS THE JURY MAY ASSESS."

§ 766. "Such damages as the jury may assess"—Statutes.
767. Employer's Liability Act.
768. "Such damages as the jury may assess"—Pecuniary loss—Punitive damages.
769. Employer's Liability Act—Death—Pecuniary loss—Exemplary damages.
770. Death—Jury and instructions.
771. "Such damages as the jury may assess"—Factors generally to be considered.
772. Death of employee—Factors generally to be considered.
773. Death of employee—Physical suffering of person injured.
774. "Such damages as the jury may assess"—Solatium—Mental suffering—Loss of child's services.
775. Death of employee—Solatium—Mental suffering—Loss of society.
776. "Such damages as the jury may assess"—Support and dependency.
777. Death of employee—Legal and actual relation—Support and dependency.
778. Employer's Liability Act—Death—Reasonable expectation of benefit.
779. Employer's Liability Act—Death—Prospect of inheritance.
780. Death of employee—Physical and financial condition, age and number of beneficiaries, etc.
781. Death of employee—Probable accumulations.
782. Expenses of sickness, funeral, etc.
783. Death of employee—Life expectancy and mortuary tables.
784. "Such damages as the jury may assess"—Nominal damages—Instruction.
785. Employer's Liability Act—Death—Nominal damages.
786. Death of employee—Husband and father—Deductions.
787. "Such damages as the jury may assess"—Death of child.
788. Death of minor employee.
789. Death of employee—Collateral kindred.
790. Death—Defenses generally—Reduction of damages.
791. Negligence and contributory negligence—Death.
792. Death—Marriage and remarriage.

§ 766. "Such damages as the jury may assess"—Statutes.—In Alabama the statutes provide for the recovery of "such damages as the jury may assess" in case of the injury

or death of a minor child, and also for the death of other persons. The wrongful act, omission or negligence causing the death is the basis of the action under both of these statutory provisions. If a minor is killed the father, or the mother in certain cases, may sue, or the personal representative. Under the general enactment as to the death of a person, the action lies by the personal representative where the testator or intestate could have maintained the action if the wrongful act, etc., had not caused death. The defendant's death does not abate the action, but it may be revived against his personal representative, and a recovery by the father or mother, under the section relating to a minor's death, bars a suit by the personal representative.[1] The statute[2] includes only those cases in which death was caused by wrongful act or omission, and other suits for personal injuries are within other enactments,[3] or are controlled as to the measure of damages by the common law.[4] But the right of action in the personal representative for loss by death may exist, although the killing was occasioned by a failure to comply with the provisions of another enactment. Thus, where a person's death is occasioned by the collapse of a bridge, the county will be liable under the death loss statute where said county has failed to take a guaranty of the safety of the bridge under a legislative enactment providing for liability in such case.[5] Again, in an early case in that state it is decided that a civil action is not merged in a felony, as under the common law doctrine,[6] and this death loss act does not affect the right of elec-

[1] Ala. (Civ.) Code, 1896, secs. 25, 26, 27; Ala. Code, 1887, secs. 2587-2589; Code, 1886, sec. 2589; Code, 1876, sec. 2641; Rev. Stat. 1874, ch. 70, sec. 2; Act, Feb. 5, 1872; Rev. Code, 1767, secs. 2297, 2298. This early statute limited the amount of recovery. Action is limited to cases in which deceased himself, if death had not ensued, might have maintained the action. See King v. Henkie, 80 Ala. 505. But not so in case of an action by the father for a minor. Williams v. South & A. N. R. Co., 91 Ala. 635; 9 So. 77. The act in favor of personal representatives is constitutional. Richmond & D. R. Co. v. Freeman, 97 Ala. 289; 11 So. 800.

[2] Code, sec. 2641.

[3] Secs. 1699, 1700.

[4] East Tennessee V. & G. R. Co. v. King, 81 Ala. 177; 2 So. 152.

[5] Ala. Code, sec. 2512; Shannon v. Jefferson County (Ala.), 27 So. 977; Jefferson County v. Shannon, id.

[6] Lanford v. Barrett, 29 Ala. 700. The action was commenced under Ala. Code, sec. 1938.

tion of the father of a minor child to bring action for damages for injury sustained by the minor.[7]

§ 767. Employer's Liability Act.—In addition to the death loss statutes of Alabama, there is also in that state a legislative enactment governing the liability of employers for injuries received by a servant or employee in the business or service of the master, and under this statute such employer or master is liable in case of said injuries to the same extent as if the servant or employee were a stranger. If the injury results in death to the servant, then his personal representative may maintain an action for damages therefor, and the amount recovered is to be distributed according to the statute of distributions.[8] The ac-

[7] Code of Ala. sec. 2588, does not take away above rights under Ala. Act, Jan. 23, 1885, as to one suit only being brought, and latter statute does not take away child's common-law right of action for injury, nor right of election as to which party shall sue. Pratt Coal & I. Co. v. Brawley, 83 Ala. 371; 3 So. 555; 3 Am. St. Rep. 751; Georgia P. R. Co. v. Propst, 83 Ala. 518; 3 So. 764.

[8] Ala. (Civ.) Code, 1896, pp. 565–566, sec. 1749 (2590), p. 560, sec. 1751 (2591); Act of 1885, Code, Ala. 1886, secs. 2590–2592, given in full in Reno's Employer's Liability Acts (ed. 1846), p. 367; Sess. Acts, 1884, 1885, p. 115; Ala. Code, 1887, secs. 2590, 2591 (Ala. [Civ.] Code, 1896, secs. 1749, 1751). The injury sections cover defects in machinery, etc.; injuries caused by negligence of those intrusted with superintendence while exercising such superintendence; injuries caused by negligence of those to whose orders or directions the servant or employee is subject and did conform; injuries resulting from acts or omissions of any person in the employment of the master done or made in obedience to the rules, regulations or by-laws of the employer or in obedience to particular instructions given to any person delegated with the master's authority; injuries caused by the negligence of any person in the service of the master who has charge or control of any signal, points, locomotive, engine, switch, car, or train upon a railway or of any part of the track of a railway. (As to pleadings generally and as to no necessity of averring under this section that engineer was at the time of the injury in the discharge of his duties, see Woodward Iron Co. v. Herndon, 114 Ala. 191; 21 So. 430; 7 Am. & Eng. R. Cas. N. S. 124; 1 Am. Neg. Rep. 561.) Knowledge of the defect or negligence by the employee and failure to inform the master or employer or some superior thereof, is a defense unless such employee knew that the master or superior had knowledge thereof. Nor is the master liable unless the injury arose from or had not been remedied or discovered, owing to the negligence of the master or some person in his service intrusted with the duty of seeing that the ways, works, machinery or plant were in proper condition. As to failure to give notice of defect and nonliability of master, see Thomas v. Bellamy (Ala. 1900), 8 Am. Neg. Rep. 361.

tion should be brought by the personal representative of deceased,[9] and there must be some person entitled to inherit under the statute of distributions to enable the administrator to recover substantial damages.[10] And an action by the personal representative is not barred by a prior suit by the mother of a deceased minor to recover damages for the same injuries.[11]

§ 768. "Such damages as the jury may assess"—Pecuniary loss—Punitive damages.—The Alabama Code[12] provides that the personal representative may "recover such damages as the jury may assess." And under this provision, which is unchanged in purpose from the earlier act, "to prevent homicides,"[13] which the later Code embodies, the jury should assess damages as a punishment and not actual damages sustained by relatives of decedent.[14] And the same rule of exemplary dam-

[9] Tennessee Coal, I. & B. Co. v. Herndon, 100 Ala. 451; 14 So. 287; Stewart v. Louisville & N. R. Co., 83 Ala. 493; 4 So. 323; Williams v. South & N. A. R. Co., 91 Ala. 635; 9 So. 77; Lovell v. De Bardelaben Coal & I. Co., 90 Ala. 13; 7 So. 756; Columbus & W. R. Co. v. Bradford, 86 Ala. 574; 6 So. 90; 6 R. R. & Corp. L. J. 111. See also sec. 787, herein. Where the body of the complaint refers to deceased as plaintiff's intestate and plaintiff is discredited on the margin as administratrix, her representative capacity sufficiently appears. Louisville & N. R. Co. v. Trammell, 93 Ala. 350; 9 So. 870. An action by the mother is not a bar to suit by personal representative. Tennessee Coal & I. R. Co. v. Herndon, 100 Ala. 451; 14 So. 287.

[10] James v. Richmond & D. R. Co., 92 Ala. 231; 9 So. 335. See Columbus & W. R. Co. v. Bradford, 86 Ala. 574; 6 So. 90; Alabama, Min. R. Co. v. Jones, 121 Ala. 113; 25 So. 814; 15 Am. & Eng. R. Cas. N. S. 752. "Heirs at law" were the persons entitled to compensation under Sess. Acts, 1884, 1885, p. 115. When evidence inadmissible that deceased left wife and children. Bromley v. Birmingham, M. R. Co., 95 Ala. 397; 11 So. 341.

[11] Tennessee Coal, I. & R. Co. v. Herndon, 100 Ala. 451; 14 So. 287. See Alabama, Connellsville Coal & I. Co. v. Pitts, 98 Ala. 285; 13 So. 135; Williams v. South. & N. A. R. Co., 91 Ala. 635; 9 So. 77.

[12] Ala. (Civ.) Code, 1896, sec. 27 (2589) (2241-2413); Code, 1886, sec. 2589; Code, 1876, sec. 2641; Act, Feb. 5, 1872. See Rev. Code, 1767, sec. 2298.

[13] Act, Feb. 5, 1872.

[14] Richmond & D. R. Co. v. Freeman, 97 Ala. 289; 11 So. 800; Savannah & M. R. Co. v. Shearer, 58 Ala. 672. "The act authorizing actions for wrongful injuries causing death, approved February 21, 1860, is entitled 'An act to prevent homicides.' Acts Ala. 1859, 6018, p. 42. This act was subsequently repealed. The section of the Code under consideration is derived from the act of February 5, 1872, which was also entitled 'An act to prevent homicides.'

ages applies where a passenger on a railroad train is killed by the falling of a bridge,[15] for the act is not compensatory but punitive in its nature.[16] So compensatory damages are not recoverable in an action against a county for death caused by the collapse of a bridge.[17] And for the negligent homicide of a child by a railroad company, the damages are entirely punitive and do not depend upon mental suffering or services.[18] And upon the death of a convict from the negligence of the superintendent of a mine in which the former was compelled to work, evidence of actual damage cannot be given.[19] Nor in case of a railroad passenger's death caused by a collision, is the recovery limited to actual damages by the fact that the company's employees, whose negligence occasioned the accident, were not guilty of wantonness or wilfulness, nor in such case will a different measure of damages be assessed, whether the negligence be that of the company itself or of its employees, for there is no distinction in this respect as regards the passenger.[20] Again, the earlier statute[21]

Acts, Ala. 1871, 1872 p. 83. The act as originally passed provided that the personal representative of the person whose death was caused by the wrongful act might recover 'such sum as the jury deem just.' As the act now appears in the Code, it allows a recovery of 'such damages as the jury may assess.' The change is immaterial. Railroad Co. v. Freeman, 97 Ala. 289; 11 So. 800. . . . We have before us a statute enacted in 1872, which has been uniformly construed by the court of last resort in Alabama as awarding exemplary damages. The statute after it received such construction has been reenacted into the Code of Alabama in 1886, and again in the Code of 1896. It has been formerly declared constitutional. Railroad Co. v. Freeman, 97 Ala. 289; 11 So. 800;" Louisville & N. R. Co. v. Lansford (U. S. C. C. A. 5th C. N. D. Ala.), 102 Fed. 63, 64, 66; 42 C. C. A. 160, per Shelby, Cir. J.

[15] Louisville & N. R. Co. v. Lansford (U. S. C. C. A. Ala.), 42 U. S. C. C. A. 160; 102 Fed. 62, under Code 1896, sec. 27. See opinion in second preceding note.

[16] Louisville & N. R. Co. v. Tegnor (Ala. 1900), 28 So. 510.

[17] Shannon v. Jefferson County (Ala. 1900), 27 So. 977; Jefferson County v. Shannon, id.

[18] Alabama G. S. R. Co. v. Burgess, 116 Ala. 509; 22 So. 913.

[19] Buckalew v. Tennessee Coal, I. & R. Co., 112 Ala. 146; 20 So. 606. In this case the relation of master and servant was held not to exist in so far at least as liability for damages was concerned. It was also held that counts for trespass against the person could be joined with counts based on negligence under Ala. Code, sec. 2589.

[20] Kansas City, M. & B. R. Co. v. Sanders, 98 Ala. 293; 13 So. 57; 58 Am. & Eng. R. Cas. 140.

[21] Rev. Stat. Ala. 1874, chap. 70, sec. 2.

does not limit the damages to the pecuniary loss, but reasonable expectations of benefit should be considered.[22] This provision therefore of the Code allows punitive rather than actual or pecuniary damage.[23] In a Federal case[24] it is decided that the personal representative may recover punitive damages for the death of a minor child caused by the criminal assault of a station agent of a railroad company upon the mother, which so frightened the child, who was seven years old, that it ran upon the track and was killed.[25] Another rule, however, prevails in this state under that section of the Code which covers loss by death occasioned by an injury to a servant or employee.[26]

§ 769. Employer's Liability Act—Death—Pecuniary loss—Exemplary damages.[27]—The measure of damages under this statute in Alabama rests largely upon the questions of disposition of earnings by deceased, his probable accumulations and dependency for support,[28] and these factors involve the present pecuniary or money value of deceased's life to his family or next of kin,[29] and recklessness or wantonness will not enhance such

[22] East Tennessee, V. & G. R. Co. v. King, 81 Ala. 177; 2 So. 152, and cases cited. See this case also for construction of Code, 1876, sec. 2641, with reference to distinction between recovery for injuries resulting in death and recovery for other injuries under secs. 1699, 1700.

[23] See also South & N. A. R. Co. v. Sullivan, 59 Ala. 272.

[24] McGhee v. McCarley (U. S. C. C. A. 5th C. N. D. Ala.), 44 C. C. A. 252; 103 Fed. 55, rev'g McGhee v. McCarley, 33 C. C. A. 629; 63 U. S. App. 422; 91 Fed. 462, Pardee, Cir. J., dissented.

[25] It was said in 91 Fed. 462, that it was plain under the doctrine of Railway Co. v. Prentice, 147 U. S. 101; 13 Sup. Ct. 26, that no punitive damages were recoverable. "It is not claimed that the corporation ever authorized or ratified the alleged negligence or assault." Per Parlance, Dist. J., citing Pittsburg, C. C. & St. L. R. Co. v. Russ (U. S. C. C. A. 7th C. Dist. Ind.), 57 Fed. 822, which holds the company not liable for exemplary damages on account of malice, wantonness or oppression of its conductor in ejecting a passenger. The case (91 Fed. 462), also holds that damages under Alabama statute, Code, 1886, sec. 2588, are compensatory and not punitive. The court, Parlance, Dist. J., citing Williams v. Railroad Co., 91 Ala. 635; 8 So. 77.

[26] Ala. Employer's Liability Act of 1885, Code, Ala. secs. 2590–2592. As noted above, the act of 1872 was an act to "prevent homicides." It will also be observed that both these acts are embodied in the Code of 1886. The rule under sec. 2591 is considered elsewhere herein.

[27] See sec. 772, herein.

[28] See secs. 772, 776, 781, herein.

[29] Alabama Mineral R. Co. v. Jones, 114 Ala. 519; 21 So. 507; 8 Am. &

damages,[30] for they are confined to the pecuniary loss,[31] being compensatory and punitive.[32] Or to state the rule in other words, an employer's liability is limited to the value of the plaintiff's pecuniary interest in the life of the deceased employee, and exemplary or vindictive damages are not recoverable.[33]

§ 770. Death—Jury and instructions.—Where it is not apparent of record that the jury was misled by an instruction as to nominal damages, the court will not set aside a verdict which is not for a large sum, upon the assumption that the jury assessed such sum upon the hypothesis stated in the charge.[34] The measure of damages rests in the sound discretion of the jury, although under the general statute of Alabama, actual damages should not be considered.[35] And in case of an employee's death, where the damages are compensatory,[36] the jury have no arbitrary discretion to give as damages what they may see proper, without reference to a proper basis from which to estimate them.[37] Nor may the jury consider remote and conjectural

Eng. R. Cas. N. S. 383; 1 Am. Neg. Rep. 551; Louisville & N. R. Co. v. Trammell, 93 Ala. 350, 354; 9 So. 870; James v. Richmond & D. R. Co., 92 Ala. 231; 9 So. 335. See sec. 776, herein.

[30] Louisville & N. R. Co. v. Trammell, 93 Ala. 350; 9 So. 870. As to wanton or wilful negligence precluding a place of contributory negligence, see Louisville & N. R. Co. v. Brown, 121 Ala. 221; 25 So. 609; 14 Am. & Eng. R. Cas. N. S. 794.

[31] Decatur Car Wheel Mfg. v. Mehaffey (Ala. 1901), 29 So. 646; Louisville & N. R. Co. v. Orr, 91 Ala. 548; 8 So. 360; James v. Richmond & D. R. Co., 92 Ala. 231; 9 So. 335; Thompson v. Louisville & N. R. Co., 91 Ala. 496; 8 So. 406; 11 L. R. A. 146; Louisville & N. R. Co. v. Chaffin, 84 Ga. 519; 11 S. E. 891, under Ala. Code secs. 2590–2502. See Bessemer L. & Imp. Co. v. Campbell, 121 Ala. 50; 25 So. 793.

[32] Williams v. South & N. A. R. Co., 91 Ala. 635; 9 So. 77; Louisville & N. R. Co. v. Chaffin, 84 Ga. 519; 11 S. E. 891, under Ala. Code, secs. 2590, 2592.

[33] Louisville & N. R. Co. v. Orr, 91 Ala. 548; 8 So. 360; Thompson v. Louisville & N. R. Co., 91 Ala. 446; 8 So. 406; 11 L. R. A. 146; Columbus & W. R. Co. v. Bridges, 86 Ala. 448; 5 So. 864.

[34] Shannon v. Jefferson County (Ala. 1900), 27 So. 977; Jefferson County v. Shannon, id. As to misleading instruction as to probable accumulations, see Louisville & N. R. Co. v. Markee, 103 Ala. 160; 15 So. 511, noted under sec. 781, herein. That jury should find fact of minority, see Williams v. South & N. A. R. Co., 91 Ala. 635; 9 So. 77.

[35] Richmond & D. R. Co. v. Freeman, 97 Ala. 289; 11 So. 800. See secs. 766–769, herein.

[36] See sec. 769, herein.

[37] Louisville & N. R. Co. v. Orr, 91 Ala. 548, 553; 8 So. 360.

contingencies.[38] It is also proper to charge the jury that "if the plaintiff is entitled to recover, the measure of damage is that sum which, being put out at interest at eight per cent per annum, will yield each year, by taking a proportionate part of the principal and adding it to the interest, the amount of his yearly contributions to his family (less his personal expenses) and as that the whole remaining principal at the end of his expectancy of life, added to the interest on his balance for that year, will equal the amount of his yearly contributions to his family."[39]

§ 771. "Such damages as the jury may assess"—Factors generally to be considered.—Inasmuch as the statute allowing such damages as the jury may assess is punitive and not compensatory, evidence is inadmissible as to deceased's age, mental and physical condition, occupation and earning capacity, and also of the amount of his contribution to dependent's support.[40]

§ 772. Death of employee—Factors generally to be considered.—In an action in Alabama to recover for the death of an employee, the following factors are generally admissible, viz: deceased's age, mental and physical ability, health and strength, his occupation, skill and experience, ability to labor, amount of work done by him or his working capacity, whether he was a regular worker or not, his competency to fill a better position, his earnings and earning capacity, his means, investments and probable accumulations, the disposition of his earnings with reference to himself, his property and dependents, his habits as to sobriety, industry, savings, etc., or otherwise, his expenditures and life expectancy.[41]

[38] Tennessee Coal, I. & R. Co. v. Herndon, 100 Ala. 451; 14 So. 287. As to juror's common knowledge of life expectancy, see sec. 783, herein.

[39] Decatur Car, Wheel & Mfg. Co. v. Mehaffey (Ala. 1901), 29 So. 646. The decision evidently holds as stated in the text, although it does not clearly so appear, but there was a reversal on other grounds.

[40] Louisville & N. R. Co. v. Tegnor, 125 Ala. 593; 28 So. 510, under Code, 1896, sec. 27. "These conditions of the person killed have nothing to do with the nature or the degree of negligence, nor can they possibly mitigate or increase the punishment which the jury is authorized to impose for the commission of the offense." Id. per Tyson, J.

[41] Mining employee was a strong, healthy, sober and industrious young man. He saved a part of his wages

§ 773. Death of employee—Physical suffering of person injured.—When an employee is negligently killed there can be no allowance for physical pain or mental anguish suffered by deceased, in an action for the benefit of those entitled to recover for his death.[42]

§ 774. "Such damages as the jury may assess"—Solatium—Mental suffering—Loss of child's services.—The damages recoverable for the death of a child are entirely punitive and do not depend upon mental suffering of the survivors or loss or services of the child, and such evidence is immaterial.[43]

after paying living expenses of himself and dependents. He was an experienced miner and regular worker. Evidence was held not prejudicial to defendant that an average miner could dig a specified amount of coal where he possessed good health, strength and industry. Bessemer Land & I. Co. v. Campbell, 121 Ala. 50; 25 So. 793. See this case also as to competency for better position or advancement. Evidence may be circumstantial as to the proportion of his earnings deceased consumed in his own property, and whether the entire earnings were so consumed or whether there was a surplus is material. Deceased's age, that he was in good health and of sober habits should not, however, be deemed the sole basis of life expectancy, nor should the court, upon the basis of these factors, state to the jury the deceased's life expectancy and invade their province. Alabama Mineral R. Co. v. Jones, 114 Ala. 519; 21 So. 507; 8 Am. & Eng. R. Cas. N. S. 383; 1 Am. Neg. Rep. 551. See facts in same case, 18 So. 30. Examine same case, 121 Ala. 113; 25 So. 814; 15 Am. & Eng. R. Cas. N. S. 752. Intestate's age, habits, working and earning capacity and the disposition of his earnings and his life expectancy afford data for the admeasurements of damages, and also his expenditures on relatives, his savings and investments are material, Louisville & N. R. Co. v. Morgan, 114 Ala. 449; 22 So. 20; 2 Am. Neg. Rep. 294. Amount of deceased's income expended upon himself should be considered and deducted. Alabama G. S. R. Co. v. Hall, 105 Ala. 599; 17 So. 176. Deceased's health, ability to labor, habits of sobriety, economy and industry and gross annual earnings and expenditures and life expectancy are basis of estimation. McAdory v. Louisville & N. R. Co., 94 Ala. 272; 10 So. 507. Character of employment, age, good health, average earnings per month considered, but there was no proof of habits of economy or of net earnings. James v. Richmond & D. R. Co., 92 Ala. 231; 9 So. 235. It was also held in this last case that the recovery should be based upon proved data. Deceased's age, health, habits, means, business skill, earnings and life expectancy proper evidence. Louisville & N. R. Co. v. Orr, 91 Ala. 548, 553; 8 So. 360.

[42] Louisville & N. R. Co. v. Orr, 91 Ala. 548; 8 So. 360, 363, per Coleman, J.; James v. Richmond & D. R. Co., 92 Ala. 231; 9 So. 335, 337, per Stone, C. J.

[43] Alabama R. Co. v. Burgess, 116

§ 775. Death of employee—Solatium—Mental suffering—Loss of society.—No damages are recoverable in case of the death of an employee for mental suffering, grief or distress of the survivors, nor for loss of deceased's society.[44]

§ 776. "Such damages as the jury may assess"—Support and dependency.—Under the general statute[45] providing for the recovery of such damages as the jury may assess, the amount contributed by deceased to the support of those dependent upon him cannot be shown, as it is irrelevant.[46]

§ 777. Death of employee—Legal and actual relation—Support and dependency.—The authorities in Alabama make a distinction between cases where the entire earnings are consumed in the support of the family and where a portion only is so consumed, leaving a surplus for accumulation, although it seems that in cases where there are dependent families, who are distributees enjoying support from the earnings and also surplus accumulations, the plaintiff administrator is not confined in his recovery to the amount of injury sustained by the loss of their support, but may recover the entire present value of the accumulations as well.[47] This distinction is apparent in a later decision where it is determined that where deceased saved a part of his wages over and above the living expenses of

Ala. 509; 22 So. 913, 915, per Coleman, J., under Ala. Code, sec. 2589. The action was brought against a railroad company.

[44] Louisville & N. R. Co. v. Orr, 91 Ala. 548; 8 So. 360, 363, per Coleman, J.; James v. Richmond & D. R. Co., 92 Ala. 231; 9 So. 335, 337, per Stone, C. J.

[45] Code, 1896, sec. 27.

[46] Louisville & N. R. Co. v. Tegnor (Ala. 1900), 28 So. 510.

[47] Alabama Mineral R. Co. v. Jones, 114 Ala. 519; 21 So. 507; 8 Am. & Eng. R. Cas. N. S. 383; 1 Am. Neg. Rep. 551, per Head, J. The court adds, however, "The writer's own views are that under the statute which gives the right of action to the administrator for the benefit of all distributees alike, the measure of damages is the same in all cases whether some or all the distributees were dependent or not," and cites upon the rule as to the measure of damages, where the next of kind were dependents and all earnings were consumed in the support of the family, Louisville & N. R. Co. v. Trammell, 93 Ala. 350; 9 So. 870; McAdory v. Louisville & N. R. Co., 94 Ala. 272; 10 So. 507; Bromley v. Birmingham M. R. Co., 95 Ala. 397; 11 So. 341; Louisville & N. R. Co. v. Markee, 103 Ala. 160; 15 So. 511; Alabama G. S. R. Co. v. Hall, 105 Ala. 599; 17 So. 176.

himself and of dependents, the recovery would not be limited to the amount of probable contributions to the support of dependent next of kin,[48] and it may be shown how many and what dependents there were and their ages,[49] as a circumstance tending to aid in the solution of what amount of pecuniary benefit the dependent next of kin enjoyed from deceased's earning where the evidence is circumstantial as to the portion of earnings consumed by deceased in his own property: so a charge to the jury, which authorizes the recovery of the "present cash value or the pecuniary value" of deceased's life to his family, dependent upon him during his life expectancy, is within the rule in Alabama, except that it omits in one of its alternatives to confine the recovery to the present pecuniary value.[50] Again, the amount of deceased's expenditures upon a younger brother should be considered, as well as his savings and investments or disposition of his earnings.[51] But precise proof of the amount of such expenditures, is not required.[52] If all deceased's wages are taken in the support of himself and family, the jury may not consider that he might have accumulated an estate which his next of kin would have received,[53] and to admit evidence that deceased left a wife and children, there should be proof or an offer to show that his earnings or part thereof were expended upon them.[54] But there can be a recovery of more than nominal damages although there is no proof of deceased's net earnings or habits of economy.[55] So a father's support of his minor son may affect the personal representative's right of recovery for the value of deceased's services.[56] But where a deceased employee's heirs have no legal right of dependence

[48] Bessemer Land & I Co. v. Campbell, 121 Ala. 50; 25 So. 795.

[49] See secs. 777, 780, herein.

[50] Alabama Mineral R. Co. v. Jones, 114 Ala. 519; 21 So. 507; 8 Am & Eng. R. Cas. N. S. 383; 1 Am. Neg. Rep. 551. Pecuniary value of life to next of kin is measure of damages. Louisville & N. R. Co. v. Trammell, 93 Ala. 350; 9 So. 870.

[51] Louisville & N. R. Co. v. Morgan, 114 Ala. 449; 22 So. 20; 2 Am. Neg. Rep. 294.

[52] Tennessee Coal, I. & R. Co. v. Herndon, 100 Ala. 451; 14 So. 287.

[53] Louisville & N. R. Co. v. Markee, 103 Ala. 160; 15 So. 511.

[54] Bromley v. Birmingham M. R. Co., 95 Ala. 397; 11 So. 341.

[55] James v. Richmond & D. R. Co. 92 Ala. 231; 9 So. 335.

[56] Alabama, Connellsville Coal & I. Co. v. Pitts, 98 Ala. 285; 13 So. 135; Williams v. South. & N. A. R. Co., 91 Ala. 635; 9 So. 77.

and are not actually dependent upon him for support, the measure of damages under the Code,[57] which makes the damages recoverable against the employer distributable according to the statute of distributions is such sums as with legal interest during his life expectancy would produce at the determination of that period an amount equal to his net earnings during said expectancy, but the general factors hereinbefore stated, such as age, etc.,[58] will constitute the basis of such estimation. The court will therefore set aside as excessive a verdict which awards as damages an amount which with annual interest will exceed four times the estate which deceased would have accumulated at the termination of his life expectancy.[59] In order, however, to recover what deceased would have expended upon dependents, it need only be proven that persons survived who were dependent upon him for support and the amount he contributed thereto, and that they would have been distributees if he had left an estate.[60]

§ 778. Employer's Liability Act—Death—Reasonable expectation of benefit.—Reasonable expectation of benefit from deceased's estate or reasonable future expectations may be considered.[61]

§ 779. Employer's Liability Act—Death—Prospect of inheritance.—The prospect of pecuniary benefit from the distribution of deceased's estate may be considered,[62] unless deceased's expenditures equal his earnings,[63] but that children

[57] Code, 1886, sec. 2591.

[58] See secs. 771, 772, herein.

[59] McAdory v. Louisville & N. R. Co., 94 Ala. 272; 10 So. 507.

[60] Alabama Mineral R. Co. v. Jones, 121 Ala. 113; 25 So. 814; 15 Am. & Eng. R. Cas. N. S. 752.

[61] Louisville & N. R. Co. v. Orr, 91 Ala. 548, 553; 8 So. 360; Louisville & N. R. Co. v. Trammell, 93 Ala. 350, 354; 9 So. 870. See Louisville & N. R. Co. v. Morgan, 114 Ala. 449; 22 So. 20; 2 Am. Neg. Rep. 294; McAdory v. Louisville & N. R. Co., 94 Ala. 272; 10 So. 507; Alabama Mineral R. Co. v. Jones, 121 Ala. 113; 25 So. 814; 15 Am. & Eng. R. Cas. N. S. 752.

[62] Louisville & N. R. Co. v. Trammell, 93 Ala. 350, 354; 9 So. 870. See Louisville & N. R. Co. v. Morgan, 114 Ala. 449; 22 So. 20; 2 Am. Neg. Rep. 294; McAdory v. Louisville & N. R. Co., 94 Ala. 272; 10 So. 507; Alabama Mineral R. Co. v. Jones, 121 Ala. 113; 25 So. 814; 15 Am. & Eng. R. Cas. N. S. 752.

[63] Louisville & N. R. Co. v. Markee, 103 Ala. 160; 15 So. 511, and see cases in last note.

might have been born and inherited a deceased minor employee's estate had he lived and married, cannot be considered.[64] This factor, however, of prospective inheritance is involved with that of savings or probable accumulations of deceased and dependency of those for whose benefit recovery is sought.[65]

§ 780. Death of employee—Physical and financial condition, age and number of beneficiaries, etc.—In an action for the negligent killing of an employee, the financial condition of deceased, evidenced by his saving capacity has, in connection with the question of dependency or the contrary of those entitled to share in the recovery, a very material bearing upon the measure of damages,[66] and evidence that deceased left a wife and children will be inadmissible where it does not appear that he had expended his earnings upon them.[67] So the widow may testify that the size of her family is herself and child.[68]

§ 781. Death of employee—Probable accumulations.—In determining the measure of damages for the death of an employee, his savings and probable accumulations or what he was saving and investing from month to month and which he would probably have continued to save, will be material and relevant. Necessarily, however, this question of probable accumulations or savings and investments is involved with those of deceased's earnings, earning capacity and expenditures upon himself or upon dependents, where there are any persons dependent upon deceased.[69] But where deceased expended all his wages,

[64] Tennessee Coal I. & R. Co. v. Herndon, 100 Ala. 451; 14 So. 287.

[65] See secs. 776, 781, herein.

[66] Alabama Mineral R. Co. v. Jones, 114 Ala. 519; 21 So. 507; 8 Am. & Eng. R. Cas. N. S. 383; 1 Am. Neg. Rep. 551, citing several cases. (See same case, 18 So. 30; 121 Ala. 113; 25 So. 814; 15 Am. & Eng. R. Cas. N. S. 752.) See Louisville & N. R. Co. v. Morgan, 114 Ala. 449; 22 So. 20; 2 Am. Neg. Rep. 294. See sec. 776, herein.

[67] Bromley v. Birmingham M. R. Co., 95 Ala. 397; 11 So. 341, and see further as to evidence of family being inadmissible, Louisville & N. R. Co. v. Binion, 107 Ala. 645; 18 So. 75. See sec. 776, herein.

[68] Louisville & N. R. Co. v. Banks (Ala. 1902), 31 So. 572, 578, per Haralson, J.

[69] Bessemer Land & I. Co. v. Campbell, 121 Ala. 50; 25 So. 793; Alabama Mineral R. Co. v. Jones, 114 Ala. 519; 21 So. 507; 8 Am. & Eng. R.

a charge that if the case appears to be one where deceased would have accumulated an estate which the next of kin might have received, is misleading.[70]

§ 782. Expenses of sickness, funeral, etc.—It is declared in an early case that even if a child is of very tender years so as to be incapable of rendering any useful services, the action would doubtless lie, if averments were made of consequential injury, for expenses caused in healing the wounds, and perhaps also for the deprivation of its society.[71]

§ 783. Death of employee—Life expectancy and mortuary tables.—The probable duration of life is the basis of estimation of the sum to be awarded for an employee's death, where the heirs of deceased have no legal right of dependence and are not actually dependent upon him,[72] and the extent of life expectancy may be determined by the juror's common knowledge thereof.[73] So a charge to the jury which takes from their consideration the question of such expectancy is an invasion of their province. They should consider all the circumstances bearing upon the subject as disclosed by the evidence. The duration of a man's life cannot be positively determined. The period fixed can at the most be merely an inference, for the conditions upon which it depends are many and various, and under the same circumstances a different conclusion will be reached by minds of equal intelligence. The tables of mortality, computed upon the experience of life insurance companies, which, being of such universal recognition, the courts will judicially notice, are not conclusive that the life expectancy of any particular person, though in good

Cas. N. S. 383; 1 Am. Neg. Rep. 551; Louisville & N. R. Co. v. Morgan, 114 Ala. 449; 22 So. 20; 2 Am. Neg. Rep. 294; McAdory v. Louisville & N. R. Co., 94 Ala. 272; 10 So. 507; James v. Richmond & D. R. Co., 92 Ala. 231; 9 So. 335.

[70] Louisville & N. R. Co. v. Markee, 103 Ala. 160; 15 So. 511. See sec. 776, herein.

[71] Durden v. Barnett, 7 Ala. 169, cited also in Trow v. Thomas, 70 Vt. 580; 41 Atl. 652, to the point that medical and other extra expenses for child up to time of death are recoverable, but not funeral expenses.

[72] McAdory v. Louisville & N. R. Co., 94 Ala. 272; 10 So. 507. See as to life expectancy as a factor, secs. 771, 772, 783, herein.

[73] Louisville & N. R. Co. v. Morgan, 114 Ala. 449; 22 So. 20; 2 Am. Neg. Rep. 294.

health and of sober habits, should be declared to be the period they estimate. There are many factors which enter into the computation of life by insurance companies. Good health and sober habits may exist and yet there may be physical infirmities which create an extraordinary hazard; there are also elements of heredity, undue relation of height to weight, or one's occupation may or may not be one of hazard, and these matters may all be proper evidence, and the jury's right in the premises should not be encroached upon by inferences, which in effect withdraw the question from the jury.[74]

§ 784. "Such damages as the jury may assess"—Nominal damages—Instruction.—An instruction which directs the jury to impose nominal damages if they believe from the evidence that the negligence is so slight or so characterized by mitigating circumstances as to justify only such damages will not warrant a reversal of a verdict of one thousand dollars against a county for death caused by the collapse of a bridge, where it does not appear of record that such instruction misled the jury, for it will not be arrived at upon the hypothesis involved in such charge.[75]

§ 785. Employer's Liability Act—Death—Nominal damages.—Nominal damages are recoverable for the death of an employee, even though there is not sufficient evidence to justify a verdict for a substantial sum,[76] and a charge confining the recovery to nominal damages is properly refused where there is evidence which affords data for the awarding of a larger amount.[77] So more than nominal damages should be awarded

[74] Alabama Mineral R. Co. v. Jones, 114 Ala. 519, 21 So. 507; 8 Am. & Eng. R. Cas. N. S. 383; 1 Am. Neg. Rep. 551. Substantially the language of Head, J. In life insurance the acceptance or refusal of the risk rests also upon certain answers contained in the application, and to the medical examiner as a rule, coupled with said examiner's examination, so that there are some specific although not absolute data as to age, occupation, health, disease, etc. See Joyce on Insurance (ed. 1897), secs. 1848, 1849, 1972, 1992, 1996, 2003–2012, 2070–2072, 2074, 2076, 2077, 2079, 2081, 2096, 2097, 2612.

[75] Shannon v. Jefferson County (Ala. 1900), 27 So. 977; Jefferson County v. Shannon, id.

[76] Alabama Mineral R. Co. v. Jones, 121 Ala. 113; 25 So. 814; 15 Am. & Eng. R. Cas. N. S. 752.

[77] Louisville & N. R. Co. v. Morgan, 114 Ala. 449; 22 So. 20; 2 Am. Neg. Rep. 294.

where there is some proof on which to base a larger recovery, even though there is no evidence of net earnings or habits of economy. But substantial damages are not recoverable where there are no persons entitled to inherit,[79] and where there are no other facts in evidence than the age and death or bare killing of decedent, a verdict for other than nominal damages would, it is said, be purely conjectural.[80]

§ 786. Death of employee—Husband and father—Deductions.—In case of the death of an employee who was a husband and father, the measure of damages is materially affected by the amount of his income expended by deceased upon himself, for said expenditure should be deducted.[81] The amount of recovery is also affected by the question whether he expended his earnings upon such wife and children,[82] as well as by their dependency, legal or actual.[83] There are also other general factors which are material and relevant.[84]

§ 787. "Such damages as the jury may assess"—Death of child.—Under the general statute[85] in an action against a railroad company for a minor child's death, through the defendant's or their servant's wrongful act or negligence, the parents may recover punitive damages,[86] nor does the recovery depend upon the loss of services.[87] And the father may recover even though there was contributory negligence on the part of deceased, where the minor's employment was without the father's consent, and a fellow servant's negligence occasioned the son's death.[88] But there can be no recovery under this enactment if the

[78] James v. Richmond & D. R. Co., 92 Ala. 231; 9 So. 335.

[79] James v. Richmond & D. R. Co., 92 Ala. 231; 9 So. 335.

[80] Louisville & N. R. Co. v. Orr, 91 Ala. 548, 553; 8 So. 360.

[81] Alabama G. S. R. Co. v. Hall, 105 Ala. 599; 17 So. 176.

[82] Bromley v. Birmingham M. R. Co., 95 Ala. 397; 11 So. 341. See sec. 780, herein.

[83] McAdory v. Louisville & N. R. Co., 94 Ala. 272; 10 So. 507. See secs. 776, 777, herein.

[84] See secs. 771, 772, herein.

[85] Ala. Code, secs. 26, 27.

[86] McGhee v. McCarley (U. S. C. C. A. Ala.), 44 U. S. C. C. A. 252; 103 Fed. 55, rev'g 91 Fed. 462; Alabama G. S. R. Co. Burgess, 116 Ala. 509; 22 So. 913, under Ala. Code, sec. 2589.

[87] Alabama G. S. R. Co. v. Burgess, 116 Ala. 509; 22 So. 913.

[88] Williams v. South. & N. A. R. Co., 91 Ala. 635; 9 So. 77. See secs. 788, 791, herein.

minor was of sufficient discretion to understand the hazards of the employment, and the contract, therefore, was made with the father's consent, while the negligence of a coemployee was the cause of the injury.[89] If the father is not living, the mother may recover for her child's death under this statute.[90] And a father may recover in an action where the common law would have given him a right to damages without being limited to those causes, where the injured party could have sued.[91] If the father is not living the mother may recover.[92]

§ 788. Death of minor employee.—As we have stated elsewhere, the personal representative is alone entitled to recover under the Employer's Liability Act for injuries resulting in the death of a minor child,[93] and this enactment does not permit a parent to maintain an action for a minor's death occasioned by a fellow servant's negligence, where consent is given by said parent to the employment, the right of action in such case being in the personal representative.[94] Again, the father cannot recover under this statute where the minor had sufficient discretion to understand the dangers of the employment, and he had contracted with the employer with the father's consent, and the cause of the injury was a coemployee's negligence.[95] But where his parents

[89] Lovell v. De Bardelaben Coal & I. Co., 90 Ala. 13; 7 So. 756. See sec. 788, herein.

[90] Grimsley v. Hankins (U. S. D. C. S. D. Ala.), 46 Fed. 400, under Code, sec. 2588. In this state a mother is, it is held, entitled to the earnings and services of her minor child, where the father has deserted them for years, even though she has procured a divorce and has remarried. Winslow v. State, 92 Ala. 78; 9 So. 728. See as to mother's obligation to provide for minor child, etc., Englehardt v. Young, 76 Ala. 534, cited in Wing v. Hibbert, 9 Ohio C. P. Dec. 65. As to father's rights to earnings, see Godfrey v. Hays, 6 Ala. 501; 41 Am. Dec. 58.

[91] Williams v. South. & N. A. R. Co., 91 Ala. 635; 9 So. 77. But see King v. Henkie, 80 Ala. 505.

[92] Grimsley v. Hankins (U. S. D. C. S. D. Ala.), 46 Fed. 400.

[93] Tennessee Coal, I. & R. Co. v. Herndon, 100 Ala. 451; 14 So. 287; Lovell v. De Bardelaben, 90 Ala. 13; 7 So. 756.

[94] Williams v. South. & N. A. R. Co., 91 Ala. 635; 9 So. 77. That father may recover under sec. 2588, see this case. When father may and may not maintain action under sec. 2588, see sec. 766, herein. That employer liable to parent for injuries of boy in dangerous employment, where parent did not consent, and that knowledge of a mother that her son was so employed does not amount to consent to employment, see Marbury Lumber Co. v. Westbrook, 121 Ala. 179; 25 So. 914.

[95] Lovell v. De Bardelaben, 90 Ala. 13; 7 So. 756. This case also holds

are entitled to receive deceased's wages, the personal representative is not entitled to damages for the time of the minority, nor can the parent recover the damages sought to be recovered by the administrator for such minor employee's death.[96] The measure of damages to be awarded a father for the death of his minor son are compensatory and not punitive.[97] But remote or conjectural contingencies cannot be considered.[98] And the jury should be charged to find the fact of minority.[99]

§ 789. Death of employee—Collateral kindred.—In an action under the Employer's Liability Act of Alabama, the damages recoverable in case of death resulting from an injury, are to be distributed according to the statute of distributions.[100] In the case of collateral kindred the pecuniary benefit to which the beneficiaries are entitled, rests largely as to the amount of damages upon the question of legal or actual dependency and contribution to support of such kindred, so that evidence of expenditures of deceased upon them is material and relevant.[1]

§ 790. Death—Defenses generally—Reduction of damages.—In an action against a railroad company for loss by death of the intestate while walking upon a railroad track, the verdict of a coroner's jury showing an accidental killing is inadmissible evidence, but that deceased was intoxicated may be shown.[2] And the general statute [3] also provides for the maintenance of the action, even though there has been a prosecution or conviction or acquittal of the defendant for the wrongful act, omission or negligence. Again, under this same section where the death of a railway passenger is caused by the wrongful act or negli-

that he cannot recover under the general statute as to death losses.

[96] Tennessee Coal, I. & R. Co. v. Herndon, 100 Ala. 451; 14 So. 287. See Alabama, Connellsville Coal & I. Co. v. Pitts, 98 Ala. 285; 13 So. 135. Minor was 19 years old, employed in a mine. Williams v. South. & N. A. R. Co., 91 Ala. 635; 9 So. 77.

[97] Williams v. South. & N. A. R. Co., 91 Ala. 635; 9 So. 77.

[98] Tennessee Coal, I. & R. Co. v. Herndon, 100 Ala. 451; 14 So. 287.

[99] Williams v. South. & N. A. R. Co., 91 Ala. 635; 9 So. 77.

[100] Code, 1886, secs. 2590–2592, and this is so under the General Statute. Code, 1887, sec. 2589.

[1] See Louisville & N. R. Co. v. Morgan, 114 Ala. 449; 22 So. 20; 2 Am. Neg. Rep. 294. See secs. 776, 784, herein.

[2] Memphis & C. R. Co. v. Womack, 84 Ala. 149; 4 So. 618.

[3] Code, sec. 2589. See sec. 766, herein.

gence of the company, the jury cannot consider in reduction of damages, the fact that other suits are pending against the defendant for the death of other persons resulting from the same collision.[4] But the amount expended by a deceased husband and father upon himself should be deducted.[5] And if the action is based upon the claim of wantonly and wilfully causing the death, then inasmuch as consent can give no right to kill, it is no defense that the intestate's wantonness and deliberate exposure of himself to the danger contributed to the result.[6]

§ 791. Negligence and contributory negligence—Death.—The questions of negligence and contributory negligence are especially pertinent under the Alabama statutes, since under the general act punitive damages are recoverable, and there are particular provisions under the Employer's Liability Act making these questions of importance. As we have, however, considered negligence and contributory negligence under a separate chapter, we shall only briefly note a few cases here. Where deceased was struck by a train and defendant relies upon her subsequent declarations, intimating that she had been careless, it is proper to show that she did not recover consciousness after being so struck.[7] And in case of the death of a railroad employee by a collision, the facts showing negligence or contributory negligence will be important in the first instance and are a matter for the jury.[8] Although if there is a defense of contributory negligence, defendant's wanton, reckless or intentional negligence must be alleged and proved.[9] An expert witness may tes-

[4] Kansas City, M. & B. R. Co. v. Sanders (Ala.), 13 So. 57.

[5] Alabama G. S. R. Co. v. Hall, 105 Ala. 599; 17 So. 176.

[6] Louisville & N. R. Co. v. Orr, 121 Ala. 489; 26 So. 35.

[7] Memphis & C. R. Co. v. Martin, 117 Ala. 367; 23 So. 231.

[8] Alabama Mineral R. Co. v. Jones, 114 Ala. 519; 21 So. 507; 8 Am. & Eng. R. Cas. N. S. 383. See next note for former appeal in this case.

[9] Jones v. Alabama Mineral R. Co., 107 Ala. 400; 18 So. 30. See last note and see same case, 121 Ala. 113; 25 So. 814; 15 Am. & Eng. R. Cas. N. S. 752. But see Louisville & N. R. Co. v. Markee, 103 Ala. 160; 15 So. 511, noted at end of this section. As to sufficient allegation that injury causing death was wantonly inflicted, see Memphis & C. R. Co. v. Martin, 117 Ala. 367; 23 So. 231. As to averments in action to recover damages for employee's death caused by the negligent act of defendant's engineer under Code, sec. 2590, subsections 2, 5, and as to contributory negligence being for the jury, see Woodward Iron Co. v. Herndon, 114 Ala.

tify what constitutes a safe distance for a section hand to stand near a passing train, where defendant alleges that he was in dangerous proximity thereto.[10] And in an action for the death of a railway passenger caused by a collision, it is proper in assessing the damages to consider not only the immediate acts of negligence, but also all successive acts of negligence or of omission leading up to the accident. So with relation to such passenger there is no distinction between the company's acts of negligence and those of its employee's causing the collision, nor does the measure of damages depend upon any such distinction and, as elsewhere stated, the recovery is not limited by the fact that there was no wantonness or wilfulness on the part of defendant's employees.[11] Again, a minor employee's heedless disregard of a notification and caution by a coemployee of the danger from cars on a mining tramway becoming uncontrollable, will prevent a recovery for his death, even though there was no direct warning from his employer.[12] It is further decided that want of due care and diligence is not presumed against the plaintiff, nor is the burden upon him to prove affirmatively the exercise thereof.[13] And although a minor son has been guilty of contributory negligence a father, who has not consented to his employment and has no knowledge thereof, may, under the general statute,[14] recover for his death caused by the negligence of a fellow servant.[15] But where contributory negligence on the part of deceased would have been a complete defense, it is also a defense against the personal representative,[16] although it is decided that if it is alleged

191; 21 So. 430; 7 Am. & Eng. R. Cas. N. S. 124; 1 Am. Neg. Rep. 561. When plea of contributory negligence is too general, and as to sufficiency of complaint alleging engineer's negligence, see Louisville & N. R. Co. v. Markee, 103 Ala. 160; 15 So. 511.

[10] Culver v. Alabama M. R. Co., 108 Ala. 330; 18 So. 827.

[11] Kansas City, M. & B. R. Co. v. Sanders, 98 Ala. 293; 13 So. 57; 58 Am. & Eng. R. Cas. 140. That recklessness or wantonness will not enhance damages for an employee's death, see Louisville & N. R. Co. v. Trammell, 93 Ala. 350; 9 So. 870. See secs. 768, 769, herein.

[12] Alabama, Connellsville Coal & I. Co., 98 Ala. 275; 13 So. 135.

[13] Bromley v. Birmingham M. R. Co., 95 Ala. 397; 11 So. 341.

[14] Code, sec. 2588.

[15] Williams v. South. & N. A. R. Co., 91 Ala. 635; 9 So. 77. See secs. 787, 788, herein, as to death of child and minor employee.

[16] King v. Henkie, 80 Ala. 505.

that the death was intentionally or wantonly caused, the plea of contributory negligence is no answer thereto.[17]

§ 792. Death—Marriage and remarriage.—If an administratrix marries during action brought by her for loss through death of her intestate, her remarriage does not abate the action, but her husband should be joined as coplaintiff.[18] But the probability of the marriage of a deceased minor employee had he lived, and that he would have had offspring is too remote to be considered.[19] The identity of her husband may be shown by a photograph introduced in evidence by the widow, when taken in connection with the photographer's identification thereof as the likeness of a man of the same name as said husband, coupled with the testimony of another witness who had seen deceased and recognized the likeness.[20]

[17] Louisville & N. R. Co. v. Markee, 103 Ala. 160; 15 So. 511. See also Louisville & N. R. Co. v. Orr, 121 Ala. 489; 26 So. 35. See sec. 790, herein.

[18] Memphis & C. R. Co. v. Womack, 84 Ala. 149; 4 So. 618.

[19] Tennessee Coal, I. & R. Co. v. Herndon, 100 Ala. 451; 14 So. 287, 291, per Coleman, J.

[20] Luke v. Calhoun County, 42 Ala. 115. This was an action by a widow to recover the penalty for the murder of her husband, under Act, Feb. 28, 1868.

CHAPTER XXXIV.

"DAMAGES FOR THE DEATH"—"PECUNIARILY SUFFERED OR SUSTAINED"—DIRECT DAMAGES.

§ 793. "Damages for the death"—"Pecuniarily suffered or sustained"—Statutes.
794. Same subject continued.
795. "Direct damages sustained"—Miner's statute.
796. "Damages for the death"—"Pecuniarily suffered or sustained" — Pecuniary loss.
797. "Damages for the death"—"Pecuniarily suffered or sustained" — Exemplary damages.
798. "Damages for the death"—"Pecuniarily suffered or sustained" — Jury and instructions.
799. "Damages for the death"—"Pecuniarily suffered or sustained"—General elements of damages.
800. "Damages for the death"—"Pecuniarily suffered or sustained"—Sufferings of injured person.
801. Same subject continued.
802. "Damages for the death"—"Pecuniarily suffered or sustained"—Mental suffering—Loss of society, etc.
803. "Damages for the death"—"Pecuniarily suffered or sustained"—Relations, legal and actual, of deceased to beneficiaries—Support and dependency.
804. Same subject continued.
805. "Damages for the death"—"Pecuniarily suffered or sustained" — Reasonable expectation of pecuniary benefit.
806. "Damages for the death"—"Pecuniarily suffered or sustained"—Prospect of inheriting.
807. "Damages for the death"—"Pecuniarily suffered or sustained"—Physical and financial condition, age, number of family, etc., of beneficiaries.
808. "Damages for the death"—"Pecuniarily suffered or sustained"—Probable accumulations.
809. "Damages for the death"—"Pecuniarily suffered or sustained"—Expenses of sickness, funeral, etc.
810. "Damages for the death"—"Pecuniarily suffered or sustained"—Time lost by parent.
811. "Damages for the death"—"Pecuniarily suffered or sustained"—Life expectancy—Mortuary tables.
812. "Damages for the death"—"Pecuniarily suffered or sustained" — Nominal damages.

§ 813. "Damages for the death"—"Pecuniarily suffered or sustained" — Death of husband — Husband and father.
814. "Damages for the death"—"Pecuniarily suffered or sustained" — Death of wife.
815. "Damages for the death"—"Pecuniarily suffered or sustained"—Death of parent.
816. "Damages for the death"—"Pecuniarily suffered or sustained"—Death of parent—Care, training, etc., of children.
817. "Damages for the death"—"Pecuniarily suffered or sustained"—Death of parent—Minority and majority of children.
818. "Damages for the death"—"Pecuniarily suffered or sustained" — Death of child.
819. "Damages for the death"—"Pecuniarily suffered or sustained" — Death of child—Minority and majority.
820. "Damages for the death"—"Pecuniarily suffered or sustained"—Defenses in general.
821. "Damages for the death"—"Pecuniarily suffered or sustained"—Mitigation—Insurance.
822. "Damages for the death"—"Pecuniarily suffered or sustained"—Mitigation of damages—Inheritance.
823. "Damages for the death"—"Pecuniarily suffered or sustained"—Marriage and remarriage.

§ 793. "Damages for the death"—"Pecuniarily suffered or sustained"—Statutes.—The statutes of Delaware and Pennsylvania provide for the recovery of "damages for the death" whenever such death is caused by unlawful violence or negligence, and the party injured has brought no suit to recover damages during life. The right of recovery exists in the widow, or if none, then in the personal representatives.[1] In the latter state, however, the persons entitled to damages for injuries causing death are the husband, widow, children or parents, and they take in the proportion they would take deceased's personal estate in case of intestacy without liability to creditors; no other relations can recover, and the declaration shall state who are the

[1] Del. Rev. Code, 1852, p. 644, as am'd Laws, 1874, p. 644, am'd 1893, p. 788, chap. 31; vol. 13, Bright. Purd. Dig. 1894, p. 1603, sec. 3; 2 id. pp. 1267, 1268, sec. 3; 2 id. (12th ed.) p. 160, sec. 3; Purdon's Dig. 1862, p. 754, sec. 2; Pa. Act, April 15, 1851, P. L. 674. See Pennsylvania R. Co. v. McCloskey, 23 Pa. St. 526; Pa. Act, April 26, 1855, P. L. 309. See Huntingdon & B. T. R. Co. v. Decker, 84 Pa. St. 419; North Penn. R. Co. v. Robinson, 44 Pa. St. 175. See next following note herein.

parties entitled to such action.[2] Other sections of the Pennsylvania statute provide for a right of action in case of injury or loss of life of persons not employees lawfully engaged or employed in or about the roads, depots and premises of a railroad company, or in or about a train or car therein or thereon, but the action or recovery is restricted to such as would exist if such person was an employee. Passengers, however, are not included.[3]

[2] Bright. Purd. Dig. pp. 1267, 1268, secs. 4, 5; Purdon's Dig. 1862, p. 754, sec. 3. That acts of 1855 and 1868 are in pari materia, see note to sec. 796, herein, as to pecuniary loss. Pa. Act, April 26, 1855, P. L. 309. "The act of April 26, 1855, changed the law" (Act, April 15, 1851) "so far as the personal representatives were concerned and conferred the right of recovery only upon parents for the loss of children and upon children for the loss of parents, and reciprocally upon husband and wife." Pennsylvania R. Co. v. Zebe, 33 Pa. St. 318, 328, per Thompson, J. Examine McCafferty v. Pennsylvania R. Co., 193 Pa. St. 339; 44 Atl. 435, noted more fully in note near end of this section. See further as to constitution not changing act of 1855, Brooks v. Danville, 95 Pa. St. 158. As to the meaning of "parents" and "children," see Pennsylvania R. Co. v. Adams, 55 Pa. St. 499, noted sec. 803, herein. That wife may recover for husband's death under Act, April 15, 1851, see Gross v. Electric Tract. Co., 180 Pa. St. 99; 36 Atl. 424. That Act, 1851, P. L. 674 and Act, 1855, P. L. 309, sec. 2, not abrogated as to time limit for suing by widow or personal representative by Pa. Const. art. 2, sec. 21, see Bachman v. Philadelphia & R. R. Co., 185 Pa. 95; 39 Atl. 834; Grath v. Iowa Barb Wire Co. (C. P.), 5 Northampton Co. Rep. 359. Administrator is not the proper party to sue under Act, 1855, where deceased left only a mother and no wife or children. Marshall v. Masselli (C. P.), 30 Pitts. L. J. N. S. 147. Nonresident alien mother cannot recover, though deceased a resident, where former could not have sued in her own country. Deni v. Pennsylvania R. Co., 181 Pa. 525; 37 Atl. 558; 40 W. N. C. 281; 28 Pitts. L. J. N. S. 31, aff'g 19 Pa. Co. Ct. 7; 6 Pa. Dist. Rep. 15. As to suit by all the surviving children for killing of father, see North Penn. R. Co. v. Robinson, 44 Pa. St. 175. Children may sue for mother's death under Act, April 26, 1855 and Act, April 4, 1868, sec. 2. Schnatz v. Philadelphia & R. R. Co., 168 Pa. 692; 28 Atl. 952; 34 W. N. C. 290. As to joinder of widow and minors, see Philadelphia, W. & B. R. Co. v. Conway, 112 Pa. St. 511; 4 Atl. 362. When right of action solely in widow exclusive of surviving parents. Lehigh Iron Co. v. Rupp, 100 Pa. St. 95. Right of action is in widow under Act, April 26, 1855, P. L. 309, and where widow and children survive demurrer lies to statement in suit by children. Snyder v. Philadelphia & R. R. Co. (Pa. C. P.), 9 Pa. Dist. R. 3. See secs. 813, 818, 819, herein.

[3] 2 Bright. Purd. Dig. pp. 1267, 1268, sec. 6; Act, April 4, 1868, P. L. 58. No recovery can be had where a

§ 794. Same subject continued.—It is further provided[4] that in actions against common carriers or corporations owning, operating or using a railroad as a public highway to recover for personal injuries or loss of life, only such compensation for loss or damage shall be recovered as the evidence shall clearly prove to have been pecuniarily suffered or sustained.[5] In determining the measure of damages under these various provisions of the statute, it is an important consideration that the constitution provides that where an injury results in death, the right of action survives.[6] Again the Pennsylvania act,[7] providing for the pun-

railroad train, moving rapidly and which gave no signal of its approach, struck and killed a person wheeling brick for contractors to a railroad culvert. Fleming v. Pennsylvania R. Co., 134 Pa. 477; 19 Atl. 740; 26 W. N. C. 180.

[4] 2 Bright. Purd. Dig. pp. 1267, 1268 sec. 7; Act, April 4, 1868, P. L. 53, 58.

[5] Mere fact that body of deceased was found between the railroad tracks is not sufficient in itself to justify a recovery. Welsh v. Erie & W. V. R. Co., 181 Pa. 461; 37 Atl. 513. Evidence that deceased was in the service of the railroad company is admitted as matter of inducement and need not be proven, where it is alleged that he was in the company's employ which owned the road, and the plea thereto is not guilty with notice of special matter. Somerset & C. R. Co. v. Galbraith, 109 Pa. St. 32; 1 Cent. 138. The constitution of this state provides that the general assembly shall not limit the amount to be recovered for injuries resulting in death. Const. Pa. 1874, art. 3. See also 2 Bright. Purd. Dig. pp. 1267, 1268, sec. 1. The Act of 1868, P. L. 53, limiting the recovery to $3,000 in case of injuries to the person, and to $5,000 in case of death, in suits against common carriers, and further providing that accepting such provision made it a part of the act of incorporation, is abrogated by the Const. art. 3, sec. 21, and such act does not become a part of the contract with the corporation. Pennsylvania R. Co. v. Bowers, 124 Pa. St. 183; 16 Atl. 836; 2 L. R. A. 621; 23 W. N. C. 257; 46 Phila. Leg. Int. 210; 19 Pitts. L. J. N. S. 460. See further as to limitations, North Pennsylvania R. Co. v. Kirk, 90 Pa. St. 15. That legislature cannot subsequently limit accrued right, see Kay v. Pennsylvania R. Co., 65 Pa. St. 269.

[6] Const. Pa. 1874, art. 3. See also 2 Bright. Purd. Dig. pp. 1267, 1268, secs. 1, 2. "The injuries having resulted in plaintiff's death on October 30, 1894, after the cause was at issue, her personal representative was afterwards duly substituted as plaintiff, under the Act of April 15, 1851, and art. 3, sec. 21, of the constitution as construed by this court in Birch v. (Pittsburgh, C. C. & St.) R. Co., 165 Pa. St. 339; 30 Atl. 826 (36 W. N. C. 69; 25 Pitts. L. J. N. S. 283). The latter declares that in case of death from such personal injuries, 'the right of action shall survive and the general assembly shall prescribe for whose benefit such action shall

[7] April 1, 1836.

ishment of guilty persons, does not prevent recovering compensation for death by negligence under the statute therefor in the sense that the judgment will acquire a punitive character.[8]

§ 795. "Direct damage sustained"—Miners' statute.—In Pennsylvania there may be a recovery for the "direct damage sustained," for any violation of, or wilful failure to comply with the provisions of the miners' statute, and where loss of life is occasioned thereby, a right of action accrues to the widow and lineal heirs against the party at fault to recover like damages.[9]

be prosecuted,' and the 18th section of the former provides that no action thereafter brought 'to recover damages for injuries to the person, by negligence or default, shall abate by reason of the death of the plaintiff, but the personal representative of the deceased may be substituted as plaintiff and prosecute the suit to final judgment and satisfaction.' In Birch v. Rd. Co., supra, we held that this provision of the Act of 1851 has not been either expressly or by implication repealed or modified by subsequent legislation, and we have no reason now to doubt the soundness of that conclusion." Maher v. Philadelphia Tract. Co., 181 Pa. 391; 37 Atl. 571; 40 W. N. C. 477; 3 Am. Neg. Rep. 85, per Sterrett, Ch. J. It is also held in Birch v. Rd. Co., cited in the above quotation, that the action survives, although it alleged in the amended statement that deceased died as the result of the injuries. Where the action is begun under Act of April 15, 1851, and after death carried on by the administratrix said act giving to the common-law right, the quality of survivorship, damages cannot be recovered in said action for the death, which right exists under the statute creating a new cause of action for death in certain cases under certain conditions for the benefit of designated parties (Act, April 25, 1855). McCafferty v. Pennsylvania R. Co., 193 Pa. St. 339; 44 Atl. 435. The survival action does not include a recovery for the death; it is still for the personal injury. Maher v. Philadelphia Tract. Co., 181 Pa. 391; 37 Atl. 571; 40 W. N. C. 477; 3 Am. Neg. Rep. 84, citing Moe v. Smiley, 125 Pa. St. 141; 17 Atl. 229; 3 L. R. A. 341; 23 W. N. C. 461; 20 Pitts. L. J. N. S. 45; 46 Phila. Leg. Int. 351, per Ch. J. Paxson, Pennsylvania R. Co. v. Zebe, 33 Pa. St. 318, 329, per Thompson, J.; Pennsylvania R. Co. v. McCloskey, 23 Pa. St. 526; 6 Am. Neg. Cas. 232. Right of action for damages to the person survives in Delaware. Parvis v. Philadelphia W. & B. R. Co. (Del.), 14 Atl. 702.

[8] Pennsylvania R. Co. v. McCloskey, 23 Pa. St. 526, 528, per Lowrie, J.

[9] 2 Bright. Purd. Dig. (12th ed.) p. 1377, sec. 385; Bright. Purd. Dig. Supp. p. 2252, sec. 70; Act, May 15, 1893, P. L. 52, being "An act relating to bituminous coal mines and providing for the lives, health, safety and welfare of persons employed therein" is constitutional as to title. Read v. Clearfield Co., 12 Pa. Super. Ct. 419. Said act is unconstitutional in authorizing medical treatment at expense of the county of persons injured in or about a mine. La Ross

§ 796. "Damages for the death"—"Pecuniarily suffered or sustained"—Pecuniary loss.—In Delaware it is declared that the measure of recovery by a widow for her husband's death is the money value of his life to her.[10] So evidence which does not show a pecuniary loss to a husband or which shows the value of deceased's life independently of him is inadmissible.[11] In Pennsylvania, it was declared in an early case, that a money value must be placed upon the life of a human being, very much as would be done upon his health or reputation, and that the law could fix no definite measure of damages which are essentially indefinite.[12] But outside of the question of wilful negligence of the defendant,[13] the courts of that state have, in an action for the death itself,[14] adhered since an early date to the rule of giving damages only upon such bases as are susceptible of a pecuniary estimate, having regard to the value of the life.[15] And the statute in express terms added force to this rule by substantially reasserting it and requiring also the pecuniary loss to be clearly proven in certain actions, although it appears that in this respect the force of this later enactment

v. Allegheny Co., 22 Pa. Co. Ct. 360; 8 Pa. Dist. Rep. 301; 29 Pitts. L. J. N. S. 410. Minor employed, by parents' consent, but employment changed to a more dangerous one without their knowledge, makes mine owner liable for such child's death. Weaver v. Iselin, 161 Pa. 386; 29 Atl. 49. Knowledge of engineer's incompetency necessary to make mine owner liable for death of person occasioned thereby. Mulbern v. Lehigh Valley Coal Co., 161 Pa. 270; 28 Atl. 1087. See also Lineoski v. Susquehanna Coal Co., 157 Pa. 153; 27 Atl. 577; 33 W. N. C. 204; Christner v. Cumberland & E. L. Coal Co., 146 Pa. 67; 23 Atl. 221, under Mining Act, 1885. When owner of mine not liable for death of miner whose act contributed thereto. Bradbury v. Kingsbury Coal Co., 157 Pa. 231; 27 Atl. 400; 33 W. N. C. 94. Culm piled above mine in usual manner, mine owner not liable for caving in of mine. Lineoski v. Susquehanna Coal Co., 157 Pa. 153; 27 Atl. 577; 33 W. N. C. 204. When mine boss is fellow servant so as to preclude recovery for death of minor. Haley v. Kein, 151 Pa. 117; 25 Atl. 98; 31 W. N. C. 18.

[10] Harkins v. Pullman Pal. Car Co. (U. S. C. C. D. Del.), 52 Fed. 724.

[11] Wilcox v. Wilmington City R. Co. (Del. Super.), 2 Pennewill, 157; 44 Atl. 686.

[12] Pennsylvania R. Co. v. McCloskey, 23 Pa. 526.

[13] See sec. 797, herein.

[14] As to the survival action, see sec. 800, herein.

[15] But as to life having an independent value, see Pennsylvania R. Co. v. Keller, 67 Pa. St. 300.

has been extended as including a rule of compensation in cases wherein the remedy is given by the earlier statute.[16]

[16] That measure of damages is the pecuniary loss and the value of the life measured thereby is supported by the following decisions. It is a matter of pecuniary compensation, although the jury can give the money value of the life of a wife. Waechter v. Second Ave. Tract. Co., 198 Pa. St. 129; 47 Atl. 967. Sec. 7, Act April 4, 1868, by positive terms eliminates all evidence of damages in case of death other than a loss of money to those entitled to recover, and if plaintiffs have lost money by the death, then Act of April 26, 1855, gives the right of action. Schnatz v. Philadelphia & R. R. Co., 160 Pa. 602-606; 34 W. N. C. 290; 28 Atl. 952, per Dean, J. Deceased was a married woman and a passenger on defendant's train, and was killed after alighting and while crossing the track. The action was by the husband. The evidence in this case was that deceased was plaintiff's wife, that she was 66 years of age and had always been a healthy woman, etc., and the court below refused to charge that the evidence failed to show a pecuniary loss or to warrant the jury in finding substantial damages. And that the verdict if for the plaintiff should be in a nominal sum. Such refusal so to charge was affirmed. Delaware, etc., Co. v. Jones, 128 Pa. St. 308, 314, 315, per Sterrett, J.; 18 Atl. 330. The court also declared that the general charge to the jury was fair and impartial and they append that portion which is relevant as given by Rice, P. J., although there was no discussion as to this part thereof. It is as follows: "Now of course the loss of a wife or of a mother from some points of view cannot be compensated by any pecuniary damages and the law does not undertake to compensate for such a loss except that the loss is a pecuniary one. In other words it does not give to the surviving husband or the children, damages by reason of the suffering that the deceased endured, by reason of the grief caused by her death or by reason of the loss of the mere companionship of the wife or mother, because none of these can be measured pecuniarily. It is compensation for the pecuniary loss that the plaintiff would be entitled to recover under the testimony in the case, and that is what the value of her services was as the wife of the plaintiff. That is a difficult question to answer even laying aside all sentimental considerations. You are to take into consideration her age, her condition in life so far as it has been shown by the testimony, her health, the probabilities as to her living and being able to render service and measure the damages in that way." In another case brought under the acts of April 15, 1851, P. L. 674, and April 26, 1855, P. L. 30, it is said that the "plain object of the act was to provide a mode by which the family of one who has lost his life under such circumstances might recover a reasonable compensation for the pecuniary loss sustained. It was not intended to make families suddenly rich by the loss of their head nor to bring about an equal division of property." Mansfield Coal & C. Co. v. McEnery, 91 Pa. St. 185, 189; 36 Am. Rep. 662, per Paxson, J. Where the plaintiff's husband, an engineer, was killed in a collision, leaving a widow and two

§ 797. "Damages for the death"—"Pecuniarily suffered or sustained"—Exemplary damages.—The damages which are recoverable in an action for death by wrongful or negligent act are merely compensatory. No exemplary damages can be given,[17] except in those cases where there is bad motive or circumstances of aggravation which would justify punitive damages.[18] So in an early Pennsylvania case the court, in its charge to the jury, directed that exemplary damages might be recovered in certain cases where the evidence showed oppression, fraud, wantonness or reckless disregard of others' safety, etc., on the part of defendant, but in the same instruction it was stated that in the case before the jury no such facts were produced.[19] Again, it is declared in that state that "we are speak-

children, it was declared that the pecuniary loss suffered was the proper measure of damages. Huntingdon & Broad Top R. Co. v. Decker, 84 Pa. St. 419, 425. See extract from opinion in this case in sec. 813, herein. Recovery is limited to the pecuniary loss. The act of 1868 was declaratory of what the courts had said was the rule of damages under the act of 1855 being the pecuniary loss, and although the words of the act of 1868 are in the past tense, so far as this clause is concerned, it should not be so construed as it would deny all damages. The acts of 1855 and 1868 are in pari materia; they concern the same statutory rights and neither contains what the other does, but both make a system. Together they give a right of action and fix a standard of compensation. Life, by the act of 1855, was estimated by the same standard as property, viz, its pecuniary loss not to be enhanced by any considerations of pain to the deceased or anguish to the survivors. Pennsylvania R. Co. v. Keller, 67 Pa. St. 300, 308, per Thompson, C. J. See also sec. 812, herein, as to nominal damages. See further that measure of damages is the pecuniary loss only, Pennsylvania R. Co. v. Butler, 57 Pa. St. 335, 338 (a case of action for death of father brought for benefit of minor children), or only such as can be tested by a pecuniary estimate not speculative or fanciful. Pennsylvania R. Co. v. Zebe, 33 Pa. St. 318, 328, 329, per Thompson, J. See also McHugh v. Schlosser, 159 Pa. St. 480, per Williams, J.; Pennsylvania Teleg. Co. v. Varnau (Pa.), 15 Atl. 624; Lehigh Iron Co. v. Rupp, 100 Pa. St. 95, 99.

[17] Lehigh Iron Co. v. Rupp, 100 Pa. St. 95, 99; Mansfield Coal & C. Co. v. McEnery, 91 Pa. St. 185, 189, per Paxson, J. In this case the court declared it was a mere question of compensation. Pennsylvania R. Co. v. Henderson, 51 Pa. St. 315. See secs. 794–796, 800, herein.

[18] Lehigh Iron Co. v. Rupp, 100 Pa. 95, 98, per Trunkey, J.

[19] Pennsylvania R. Co. v. Ogier, 35 Pa. St. 60, 69; 78 Am. Dec. 322. The action here was for the wrongful killing of a husband by a railroad company. That portion of the charge upon which the above text is based is appended hereto. The judgment was affirmed, but it does

ing only of cases of death by negligence, unaccompanied by wantonness, violence or gross negligence evincive of moral turpitude. In such cases no doubt but merely compensatory damages may be exceeded."[20] In another decision, however, it was said by the court that exemplary damages were not recoverable.[21] In Delaware, in a charge to the jury, the court directed them that "we do not think that the doctrine of exemplary damages applies to a case like the present."[22]

§ 798. "Damages for the death"—"Pecuniarily suffered or sustained"—Jury and instructions.—The value of deceased's life is to be fixed by the jury under all the circumstances.[23] So the jury may find from the evidence such as board furnished without charge, services rendered in nursing of daughters during illness and in the household, and from other actual gifts a reasonable expectation of future benefits of like character and value, and so approximate to the pecuniary loss.[24] And it is

not appear that this point was considered. The general question of negligence, however, and its consequences was discussed in view of the facts, and we give the exemplary damage portion of the charge for whatever it may be worth as an authority, having in view its relation to the case as decided by the higher court. The court below charged the jury that "I have no doubt that cases might occur where exemplary or more than merely compensatory damages might properly be given, as where the conduct of a defendant has exhibited oppression, fraud, wantonness or other circumstances to call for exemplary damages, but I cannot see in the case before us any such production of facts. . . . I have no doubt that a reckless disregard to the safety of others would furnish the jury with sound reasons for exemplary damages, even where no intentional wrong was committed. But while the jury should conform to the just principles of the law on the one hand, they should also be careful not to distort the testimony to meet propositions for exemplary damages." Id. p. 69. The case in which this instruction appears has sometimes been cited as supporting the allowance of exemplary damages in actions for damages for death caused by negligence, etc.

[20] Pennsylvania R. Co. v. Zebe, 33 Pa. St. 318, 330, per Thompson, J.

[21] Mansfield Coal & C. Co. v. McEnery, 91 Pa. St. 185, 189; 36 Am. Rep. 662, per Paxson, J., citing Pennsylvania R. Co. v. Henderson, 51 Pa. St. 315; Pennsylvania R. Co. v. Keller, 67 Pa. St. 300.

[22] Tully v. Philadelphia, W. & B. R. Co. (Del. Super. 1901), 50 Atl. 95, per Pennewill, J.

[23] McHugh v. Schlosser, 159 Pa. 480; 28 Atl. 271; 39 Am. St. Rep. 699; 23 L. R. A. 574, per Williams, J. See also North Pennsylvania R. Co. v. Kirk, 90 Pa. St. 15.

[24] Schnatz v. Philadelphia & R. R.

also declared that the sound sense of the jury must ascertain the pecuniary value by which life is estimated, as best they may.[25] It is, however, error to charge that "if the jury find for the plaintiff, the question is one for the jury entirely." The court also directed that "in making the estimate of the value of the life and consequent damage by the death, much is still left to the sound discretion of the jury. Whatever is susceptible of a pecuniary estimate is included within it and what we have seen was not to be included must be excluded."[26] But it is not error, after giving a correct instruction to add that "much is left and must always be left to your sound discretion," where the court in conclusion defines the discretion to be "a fair and reasonable discretion based upon the law and the evidence;" since, as was said by the higher court, "if this sound discretion was sufficiently explained to be circumscribed by the rule of damages applicable to the case, we must presume that the jury so understood it. We can do nothing else."[27] And in an earlier decision it was declared that the task was for the "jury, aided by the cautions and counsels of the judge.[28]

§ 799. "Damages for the death"—"Pecuniarily suffered or sustained"—General elements of damages.—Under the above statutory provisions the following general elements of damage may be considered in an action for negligent killing; they are deceased's age, mental and physical health, liability to accident or death, life expectancy, ability, capacity and disposition to labor or to be useful and of service to the family, physical or intellectual labor or occupation; all services generally, their value, nature and character, and the probabilities as to being able to continue to render service or to labor, the uncertainty of continuous employment and of health, whether mental or physical; past and probable earnings; earning power or

Co., 160 Pa. 602; 34 W. N. C. 290; 28 Atl. 952. See opinion in this case of Dean, J., in note to sec. 803, herein.

[25] Pennsylvania R. Co. v. Keller, 67 Pa. St. 300, 308, per Thompson, C. J.

[26] Pennsylvania R. Co. v. Zebe, 33 Pa. St. 318, 327, 330, per Thompson, J.

[27] Pennsylvania R. Co. v. Ogier, 35 Pa. St. 60, 72, per Thompson, J., dist'g Pennsylvania R. Co. v. Zebe, 33 Pa. St. 318.

[28] Pennsylvania R. Co. v. McCloskey, 23 Pa. St. 526, 531, 532, per Lowrie, J.

capacity and the probable increase or diminution thereof; whether employed in his own business or laboring for others, as where a son is in business on his own account or working for his father; habits generally, including those of industry, frugality, sobriety, business, etc., and of living and expenditures; ownership of property, wealth or state of thrift; social surroundings, or in general the circumstances and environments of the life; general disposition of earnings by way of aid rendered others, including gifts, support, etc. The above rule is, however, partly qualified in Delaware, at least so, according to a decision in that state relating to the wife's industry at home.[29]

[29] The husband's earning capacity does not limit the damages to the widow. Harkins v. Pullman Palace Car Co. (U. S. C. C. D Del.), 52 Fed. 724, Probable earnings during life, considering deceased's age, ability and disposition to labor and habits of living and expenditure were mentioned as elements in charge to jury in Croker v. Pusey & Jones Co. (Del. Super. 1901), 50 Atl. 61; 10 Am. Neg. Rep. 537, note. Deceased's health at time of death may be proven, but a wife's industry in her own home cannot be shown, although testimony may be given as to deceased's habits of industry and her other habits with reference to saving qualities at the time of her death. But her savings out of money given her by her husband after paying her household expenses are inadmissible, nor can the value of her life exclusive of her husband, based upon money received by her independently of him be shown, nor can the question be asked, "What was the deceased's earning capacity at the time of her death?" as it calls for a conclusion and is incompetent. Wilcox v. Wilmington City R. Co. (Del. Super), 2 Pennewill, 157; 44 Atl. 686. "The measure of damages would be such a sum as the deceased would probably have earned in his business during life and which would have gone to his next of kin, taking into consideration the age of the deceased, his ability and disposition to labor and habits of living and expenditure. Maxwell v. Ry. Co., 1 Marv. (Del.) 199; 40 Atl. 945. We do not think that the doctrine of exemplary damages applies to a case like the present. Although the authorities are somewhat conflicting as to the measure of damages in cases like the present, we feel bound to adhere to the rule laid down in the Maxwell case . . . Even though the plaintiff's intestate in the Maxwell case was not an infant, still there was no evidence of any substantial benefit to the beneficiaries or next of kin during the life of the deceased." Charge to jury by Pennewill, J. In Tully v. Philadelphia & W. B. R. Co. (Del. Super. 1901), 50 Atl. 95, an action against a railroad company for death of minor. "If you find for the plaintiff it should be for such sum as in your judgment under the evidence in this cause the deceased would probably have earned in his business during life and left as his estate, taking into consideration the age of the deceased, his ability and disposition to labor and habits of

In this connection it may be stated that the fact whether deceased or survivors were married or single may be important.[30]

living and expenditures. In this you are to be governed not by speculation or conjecture but by the reasonable rules governing human experience in the acquisition and retention of property under the circumstances and environments surrounding such a life. In other words you are to ascertain from the evidence what estate the deceased would have left at the termination of his probabilities of life as proved in this case." Charge of Lore, J., to the jury in Croker v. Pusey & Jones Co. (Del. Super. 1900), 50 Atl. 61, 62. A case of servant's death through negligence of master. In case of a wife's death, her age and that of her husband can be considered. Waechler v. Second Ave. Tract. Co., 198 Pa. St. 129; 47 Atl. 967. Where action is brought in lifetime of the injured party and continued after the death, diminution of earning power during a period of life, in which deceased would probably have lived had the accident not happened will be considered. One element of damage is also the total impairement of the earning power placed beyond doubt by the death. The value of the life lost is the basis of the estimate of damages, rather than the injury resulting from it to the survivor entitled to sue. Maher v. Philadelphia Tract. Co., 181 Pa. 391; 37 Atl. 571; 40 W. N. C. 477; 3 Am. Neg. Rep. 85, per Sterrett, Ch. J. Life expectancy should be based on some evidence in connection with life tables relied on. Dooner v. Delaware & H. Can. Co., 164 Pa. 17; 30 Atl. 260; 10 Am. R. & Corp. Rep. 264. Deceased mother's age and health; aid rendered to her surviving daughters by gifts and services; the fact that deceased was not wealthy, but thrifty; that she owned and cultivated land and kept a store; that she nursed her daughters, sewed for them, etc., all elements of damage. Schnatz v. Philadelphia & R. R. Co., 160 Pa. 602; 34 W. N. C. 290; 28 Atl. 952. See extended note, covering this case in sec. 803, herein, as to relationship, support, etc. Probable earnings of deceased son to age of 21 years will be a basis of damages. Madara v. Pottsville Iron & S. Co., 160 Pa. 109; 28 Atl. 639. Business, business habits and past and probable earnings by labor, physical or intellectual, age, health, ability and disposition to labor, habits of living and expenditure are all elements of damage. McHugh v. Schlosser, 159 Pa. 480, 485, 486; 39 Am. St. Rep. 699; 23 L R. A. 574, per Willams, J. See extract from opinion in this case, in note to sec. 812, herein. Health, habits and social surroundings in connection with evidence of life expectancy are proper elements. Steinbrunner v. Pittsburg & W. R. Co., 146 Pa. 504; 23 Atl. 239; 22 Pitts. L. J. N. S. 235; 29 W. N. C. 173. Age and health alone being proven does not necessarily exclude substantial or special damages, and a wife's industry and usefulness may be presumed, or in other words loss of her services as wife may be inferred. Her condition in life, so far as proven, her health and probabilities as to her living and being able to render service should be considered. Delaware, L. & W. R. Co. v. Jones, 128

[30] See sec. 803, herein.

§ 800. "Damages for the death"—"Pecuniarily suffered or sustained"—Sufferings of injured person.—In Pennsylvania where the action is brought in the lifetime of the injured

Pa. St. 308; 18 Atl. 330. See extract from opinion in this case, in note to sec. 796, herein as to pecuniary loss. Basis of pecuniary loss is probable earnings in occupation during life expectancy of deceased; probable gifts to those entitled to the recovery, deceased's age, ability and disposition to labor, also his habits of living and expenditure. Pennsylvania Teleph. Co. v. Varnau (Pa.), 15 Atl. 624. Age of deceased son and average earnings until 21 years of age, also average cost of support were considered. Pennsylvania Coal Co. v. Nee (Pa.), 12 Cent. 524; 13 Atl. 841, and Annot. "Nothing is more certain than that life, health and constant employment are uncertain. It is reasonable, therefore, that these elements should be considered by a jury in estimating the value of a man's life to his family. There is a degree of uncertainty about them, it is true, which makes it difficult for any jury to arrive at a strictly accurate conclusion." Mansfield Coal & C. Co. v. McEnery, 91 Pa. St. 185, 191; 36 Am. Rep. 662, per Paxson, J. Action was by widow and children; deceased was employed by defendant to drive a mule drawing coal cars. Damages include the value of the deceased's life to his family including wages and all such service as a father could render of pecuniary value to the wife and children, and the jury are at liberty to take into consideration questions of health, liability to accident or death. Id. 189, 190. Proper elements are probable earnings by mental or physical labor, age, ability and disposition to labor and habits of living and expenditure. Id., following Pennsylvania R. Co. v. Butler, 57 Pa. St. 335, which is also followed in Lehigh Iron Co. v. Rupp, 100 Pa. 95, 98, 99. Probable change of circumstances in life in connection with opportunities of increasing wealth not admissible. Mansfield case, id. Age and value of services of adult son. Deceased had been in business on his own account, but had returned and was working for his father. North Pennsylvania R. Co. v. Kirk, 90 Pa. St. 16. See as to this case, note to sec. 803, herein. That life has a value irrespective of earning power or earnings, see Pennsylvania R. Co. v. Keller, 67 Pa. St. 300, and see this case in note to secs. 796, 812, herein. Character of services of a wife as such, or as a wife and mother, having in view her usefulness, industry, saving ability and capacity in such relation are important and relevant factors. Pennsylvania R. Co. v. Goodman, 62 Pa. St. 329. See opinion of Agnew, J., in the case in note to sec. 802, herein. As to instruction being erroneous which included the direction that it might not be fair to deduct family expenses, see Pennsylvania R. Co. v. Butler, 57 Pa. St. 335. As to age and nonage of child in connection with reasonable expectations of pecuniary advantage, see Pennsylvania R. Co. v. Adams, 55 Pa. St. 499 (noted under sec. 803, herein. See also secs. 818, 819, herein). In this case deceased was an adult and was a worthy industrious young man. It is proper for a witness to be asked by plaintiff "from his knowledge of de-

party and survives by virtue of the statute being continued after death by the personal representative, the damages recoverable are the same as the person injured could have recovered had he lived. Included therein are damages for the pain and suffering up to the time of the death. The recovery is not for the death, but is still for the personal injury, so it has been declared that in such survival actions "there can doubtless be a recovery not only for mental and physical suffering of the injured decedent, but also for the value of his life. . . . The right to recover a solatium necessarily follows from the fact that the action as brought by the injured party is continued by the statute." It is also said that the English act, giving a right to damages for the death, gives a totally new right of action on different principles and this distinction is evidently approved.[31] Therefore, a new cause of action being created by the death loss statute, damages for the loss by death cannot be recovered in the survival suit,[32] and it logically follows that the recovery for a negligent killing of a person does not include damages for his sufferings from the injury.[33]

ceased's age, habits, health and physical condition, how long he would have been useful to his family." Pennsylvania R. Co. v. Henderson, 51 Pa. St. 315. See extract from opinion in this case and sec. 803, herein. Deceased was 75 years old —$1,500 was received. North Pennsylvania R. Co. v. Robinson, 44 Pa. St. 175. See also as to age, etc., Pennsylvania R. Co. v. McCloskey, 23 Pa. 526.

[31] Maher v. Philadelphia Tract. Co., 181 Pa. 391; 37 Atl. 571; 40 W. N. C. 477; 3 Am. Neg. Rep. 85, per Sterrett, Ch. J. See also Quinn v. Johnson Forge Co., 9 Houst. (Del.) 338; 32 Atl. 858. Damages for the death only, under Act, April 15, 1851, P. L. 674, secs. 18, 19; Pennsylvania R. Co. v. Kelly, 31 Pa. St. 372. That right of action survives in Delaware, see Parvis v. Philadelphia, W. & B. R. Co. (Del.), 17 Atl. 702.

[32] McCafferty v. Pennsylvania R. Co., 193 Pa. St. 339; 44 Atl. 435; 6 Am. Neg. Rep. 693.

[33] It does not give to the surviving husband or the children, damages by reason of the suffering that deceased endured. Delaware, L. & W. R. Co. v. Jones, 128 Pa. St. 308; 18 Atl. 330, per Rice, P. J., in charge to jury. The general charge was declared fair and impartial in the higher court, per Stewart, J., although this portion of the charge was not discussed. See extract from charge in sec. 796, herein. Damages cannot be enhanced by any consideration of pain to the deceased. Mansfield Coal & C. Co. v. McEnery, 91 Pa. St. 185, 189; 36 Am. Rep. 662, per Paxson, J. Same language in Pennsylvania R. Co. v. Keller, 67 Pa. St. 300, 308, per Thompson, C. J. Damages for suffering of the deceased are excluded, for it is not his

§ 801. Same subject continued. — Notwithstanding the above rule and its underlying principle as to the right to recover in a survival action for the injured person's pain and suffering, it is also declared that where a parent sues for damages resulting from his minor child being injured, the action is for the injury done him and not for the injury done his child, and the measure of recovery is the father's pecuniary loss, based upon his duty to maintain, protect and educate his child and on his right to such minor's earnings during minority.[34] It should, however, be also noted in this connection that the personal suffering of a child from his injuries would be a subject of action by such child himself,[35] and it is also decided that pain and suffering of the deceased should be allowed as an element of damages.[36]

§ 802. "Damages for the death"—"Pecuniarily suffered or sustained"— Mental suffering — Loss of society, etc.— Where the action is commenced by the party injured and continued after his death by the personal representative, the right to recover the same damages as the person injured could have recovered necessarily follows.[37] But where no action has been brought during the lifetime of deceased and the original suit is commenced after death to recover therefor, there can be no recovery for mental anguish or suffering nor for loss of society, nor for any other fact which has not a pecuniary value.[38] The

loss or suffering, but the injury to the family. Pennsylvania R. Co. v. Zebe, 33 Pa. St. 318, 328, 329, 330, per Thompson, J. See also Pennsylvania R. Co. v. Goodman, 62 Pa. St. 329.

[34] Woeckner v. Erie Elec. Motor Co., 187 Pa. 206; 43 W. N. C. 50; 41 Atl. 28; 3 Am. Neg. Rep. 601, per Fell, J. This case was not an action for the child's death nor a survival action, but the principles asserted in the case suggest the inquiry whether such principles would be exclusive in case a minor child's injuries should result in death after action commenced.

[35] Pennsylvania R. Co. v. Kelly, 31 Pa. St. 372. Examine McCafferty v. Pennsylvania R. Co., 193 Pa. St. 339; 44 Atl. 435, where the action was commenced by the injured person and after his death carried on by his mother as administratrix.

[36] Quinn v. Johnson Forge Co., 9 Houst. (Del.) 338.

[37] Quinn v. Johnson Forge Co., 9 Houst. (Del.) 338; 32 Atl. 858; Maher v. Philadelphia Tract. Co., 181 Pa. 391; 37 Atl. 571; 40 W. N. C. 477; 3 Am. Neg. Rep. 85. See sec. 800, herein.

[38] Pennsylvania Teleph. Co. v. Varnau (Penn.), 15 Atl. 624. Death of husband; no solatium for mental suffering or grief. McHugh v. Schlosser,

loss of "companionship" is however mentioned by the court in an early case in such a connection that it has been cited as an authority upon the point that it is an element of damages for the death of a son.[39] But in a later decision where the court charged the jury that the loss of services and companionship of the deceased wife should be considered, the word "companionship" was explained on review of the case to mean not damages by way of solace, but the character of the service performed by her in the relation of wife.[40] And it has also been expressly declared that the damages do not include the loss of the mere

159 Pa. St. 480; 24 Pitts. L. J. N. S. 285; 34 W. N. C. 33; 28 Atl. 291; 23 L. R. A. 574. Death of wife and mother; nothing for grief caused by her death. Delaware, L. & W. R. Co. v. Jones, 128 Pa. St. 308; 18 Atl. 330, charge in lower court to jury by Rice, P. J., but not discussed in higher court except generally as to charge being impartial. Death of son, only compensatory damages. Lehigh Iron Co. v. Rupp, 100 Pa. St. 95. No solatium for distress of mind or anguish of survivors. Mansfield Coal & C. Co. v. McEnery, 91 Pa. St. 185, 189, per Paxson, J.; 36 Am. Rep. 663. Not to be enhanced by anguish to the survivors. Pennsylvania R. Co. v. Keller, 67 Pa. St. 300, 308, per Thompson, C. J. Death of wife; nothing for suffering or wounded feelings of plaintiff. Pennsylvania R. Co. v. Goodman, 62 Pa. St. 329. No solatium for distress of mind. Pennsylvania R. Co. v. Butler, 57 Pa. St. 335, 338. Nothing for agonized feelings nor for loss of son's society. Caldwell v. Brown, 53 Pa. St. 453. Only compensatory damages for death of wife. Pennsylvania R. Co. v. Henderson, 51 Pa. St. 315. Death of husband; no solatium. Pennsylvania R. Co. v. Vandeveer, 36 Pa. St. 298. Minor son; nothing for mental suffering or for solace. Pennsylvania R. Co. v. Zebe, 33 Pa. St. 318, 328, 329, 330, per Thompson, J.

[39] North Pennsylvania R. Co. v. Robinson, 44 Pa. St. 175.

[40] As the language in the charge in this case was in this respect much the same as in the last cited case, we quote from the opinion: "Looking at the entire charge on the subject of damages, we think it clearly confined the damages to a pecuniary compensation for the loss of Mrs. Goodman's service. The court told the jury in express language that nothing is allowable for the suffering of the deceased nor the wounded feelings of the plaintiff. He said that the plaintiff's loss was to be measured by a just estimate of the services and companionship of the wife. It is thought that this meant by way of solace for the loss of companionship. But all the judge said on this point made it evident he did not mean compensation by way of solace, and could not have been so understood by the jury. Companionship was evidently used to express the relation of the deceased in the character of the service she performed. The form of expression perhaps was not the best selection of words, yet it certainly meant no more than that the pecuniary loss was to be measured by the nature of the services, characterized as it was by

companionship of a wife and mother.[41] So the damages for a wife's death is not a matter of sentiment.[42] In Delaware the loss of comfort or companionship of a husband will not be considered in an action by his widow for her loss by his death.[43] And in Pennsylvania in an action for damages for the wrongful killing of an adult son, it was testified to by the mother that she "considered his advice of more value than that of many others," and the court in discussing the evidence below mentioned this testimony in connection with the family relations and the reasonable expectation of benefit to the parents as bearing upon the measure of damages.[44]

§ 803. "Damages for the death"—"Pecuniarily suffered or sustained"—Relations, legal and actual, of deceased to beneficiaries—Support and dependency.—The relationship of a deceased wife in the character of the services performed by her, especially where she is a mother, enters into the estimation of the pecuniary loss from her death; and where there is a family, the relations in which the parties stood to each other affect the value of the services of deceased, for from this standpoint the marital or parental relations are of more importance than if the deceased wife were a hired servant.[45] So relationship enters into the question of damages to a surviving husband, since the value

the relation in which the parties stood to each other. Certainly the service of a wife is pecuniarily more valuable than that of a mere hireling." Pennsylvania R. Co. v. Goodman, 62 Pa. St. 329, per Agnew, J. The court further declared in this case that "the frugality, industry, usefulness, attention and tender solicitude of a wife and the mother of children surely make her services greater than those of an ordinary servant, and worth more than those of an ordinary servant. These elements are not to be excluded from the consideration of a jury in making a mere money estimate of value." Id. p. 339, per Agnew, J.

[41] We say expressly declared. This might perhaps be qualified, inasmuch as the text was a portion of the charge by Rice, P. J., in the lower court, but it was not discussed as to this point except that Stewart, J., declared the general charge fair and impartial. Delaware, L. & W. R. Co. v. Jones, 128 Pa. St. 308; 18 Atl. 330.

[42] Waechter v. Second Ave. Trac. Co., 198 Pa. St. 129; 47 Atl. 967.

[43] Harkins v. Pullman Pal. Car Co. (U. S. C. C. D. Del.), 52 Fed. 724.

[44] North Pennsylvania R. Co. v. Kirk, 90 Pa. St. 15.

[45] Pennsylvania R. Co. v. Goodman, 62 Pa. St. 329. See extract from opinion of Agnew, J., in this case in the note to sec. 802, herein.

of his deceased wife's life must not be a value independent of him and having no relevancy to his pecuniary loss.[46] Again, the fact that a husband has deserted his wife and family, and has ceased to aid in their support, affects the right of action as to the mother in case of a child's death,[47] and the nonnecessity of proof of actual pecuniary loss may be affected by the existence of the marital relation.[48] Again, the value of a husband's life to the widow and her family is the basis of the pecuniary loss sustained by her, and this value depends entirely on how long a man of his age and business could be useful in supporting them.[49] The question of relations, legal and actual, and in this connection of contribution to support, has also arisen in a number of decisions. Thus in case of a minor son who was married and living apart from his parents, this point arose upon the issue of the relative rights of the widow and parents as to recovery of damages for such husband and son's wrongful killing, and it was declared that if the child was free by age or emancipation and living apart from his parents and in no way contributed to their support, they could not maintain the action for they had suffered no pecuniary loss, and the family relation had been dissolved to the extent of actual separation. But though the child was of full age and the family relation existed in fact and the parents had a reasonable expectation of pecuniary advantage from him, they can maintain the action. So it was decided upon the main issue that under the statute the widow's sole right of action excluded the parents from any share in the damages. The question of the importance of the legal relation was also involved in the court's declaration that deceased was primarily bound to support his wife even to the full extent of his income, and although nothing was left for his father.[50] So the right to

[46] So held in Wilcox v. Wilmington City R. Co. (Del. Super.), 2 Pennewill, 157; 44 Atl. 686.

[47] Kerr v. Pennsylvania R. Co., 169 Pa. 95; 32 Atl. 96; 36 W. N. C. 325.

[48] Delaware L. & W. R. Co. v. Jones, 128 Pa. St. 308; 18 Atl. 330.

[49] Pennsylvania R. Co. v. Henderson, 51 Pa. St. 315, 321, per Read, J.

[50] Deceased was in this case over 19 years of age, and was killed by the explosion of a boiler. He had been married 6 months and had lived about 8 miles distant from his parents and the latter had given them furniture for housekeeping. After his marriage the son had not given his parents any of his earnings. Lehigh Iron Co. v. Rupp, 100 Pa. 95, per Trunkey, J.

support by a wife and children will give them an interest in the life of deceased.[51]

§ 804. Same subject continued.—Again, in an action by adult sons for damages for the wrongful killing of their father, the case was tried upon the rule in Pennsylvania that the reasonable expectation of pecuniary benefit from the family relation will sustain the action, and that there is no distinction between children of age and over age, between those married or single, between those having homes and those who were members of the parent's household, and it also appeared in this case in connection with the point of actual relations that deceased had contributed during ten years in the aggregate of about two thousand five hundred dollars yearly to the survivor's support.[52] It is upon this class of decisions that the rule has been founded that the reasonable expectation of pecuniary advantage, or of continued aid and support, rather than the existence of legal relations, is the basis of recovery, or in other words that the actual existing relations between deceased and those entitled to damages constitutes the important factor, and although the legal or actual status may have ceased for a time to exist, yet actual family relations may be again resumed, as where a deceased adult son had returned to his parent's service and had clearly evidenced an intention to remain and aid his father. Here the expectation of future benefit destroyed by his death exists as a basis of recovery.[53]

[51] Pennsylvania R. Co. v. Henderson, 51 Pa. St. 315.

[52] Stahler v. Philadelphia & R. R. Co., 199 Pa. 383. This was an action of trespass for damages. Deceased was killed in a railroad accident. Survivors were three sons, none of whom were under 39 years of age. The decision followed the rule in Schnatz v. Philadelphia & R. R. Co., 160 Pa. St. 602, and Pennsylvania R. Co. v. Adams, 55 Pa. St. 499, both of which cases are fully considered under this section. See also cases cited and considered in notes next following herein.

[53] Action by parents for death of son killed by negligence of servants of railroad company. Son was 28 years old. He had been away from home at intervals after he had attained majority, and had been in business on his own account. He had returned, however, to his father's house and for some months had been rendering services of various kinds in his father's business, for which no compensation was paid him. He had declared that he would stay and help his father and do anything he should be required to do. It was testified by his mother that his services "were of great value" and that she "considered his advice of more value than that of any others." The jury were charged that only

Again, where it was repeatedly declared by deceased that he would continue to support his parents, and although he was over age and unmarried, yet he had always labored for their support and lived with them, their reasonable expectation of support destroyed is a ground of recovery.[54] The rule of the preceding decisions has also been applied where the beneficiaries were daughters having different residences from that of their deceased mother, where the evidence clearly showed aid towards their support, and gifts from and services rendered by deceased to them clearly capable of being pecuniarily estimated.[55]

nominal damages should be given unless they found that the parental and family relation was subsisting, and that there was reasonable ground to believe it would continue to exist between plaintiffs and deceased. The charge was held objectionable, it being declared that there had been no departure from the rule in Pennsylvania R. Co. v. Adams, 55 Pa. St. 499, that the words "parents" and "children" indicated the family relation in point of fact without regard to age, and that a reasonable expectation of pecuniary advantage from a person bearing the family relation and the destruction of such expectation would sustain the action and that the question was one for the jury. North Pennsylvania R. Co. v. Kirk, 90 Pa. St. 15. See next following note herein.

[54] Pennsylvania R. Co. v. Adams, 55 Pa. St. 499. (This case was relied on in the decision given under the last preceding note.) In this case the son was killed by the railroad company's negligence and there was a reasonable expectation of support destroyed. Deceased's earnings were devoted to his parents' use even to the small amount of bounty money received by him in his first enlistment in the service, and his intention to continue to aid in their support while they lived was evidenced by repeated declarations as well as acts. He was a worthy, industrious young man, worked some for his father, gave him money, $40 of which had been bounty money, and he had always assisted his father and had said he always would. He had, however, arranged to become a substitute for a drafted man and was killed on his way to consummate the arrangement. Held proper evidential facts as to continuance of family relation and expectancy of support in future.

[55] In the following case the action was for a mother's death. Plaintiffs were three daughters who resided apart from her and were not members of her family at the place where she resided, for they had left home. Deceased was 59 years old and in good health and was killed while a passenger on defendant's railroad. At the time of her death she owned a house and about four acres of land. One of the daughters was single, lived alone and earned from $4 to $6 weekly. Her mother at times, when she needed it, gave her money and sometimes clothing. The other two daughters were married and one of them had suffered for years from a pulmonary disease. Her mother had gone to this daughter's house at various times; done household work

But where the action is not for the death itself, a different question might arise, in so far as the legal relations affect the right of action.[55]

there. The daughters' health had been improved by certain visits made their mother during the summer. Other facts appear in the opinion. The court said: "The act itself makes no distinction between children over age and those under, between those married or single, between those having homes and families of their own and those still members of the parents' household. Such distinctions may have significance in determining the amount of damage pecuniarily suffered, as limited by the act of 1868, but they do not affect the statutory right on the part of children to a standing in court as claimants or suitors. Having shown the existence of the parental relation, that the deceased was their mother, then the plaintiffs had right to submit proof of what they had lost in money by her death. . . . It may be assumed then that the mere existence of the parental relation, while it would give the children a standing in court as parties without more, would not sustain this judgment; but if there was evidence from which the jury could find a reasonable expectation of pecuniary advantage from the continued life of the mother, they might assess as damages the actual money loss of the children. To show the pecuniary loss they sustained by her death, plaintiffs offered evidence as to what pecuniary benefit they had derived from her life. This mother was not wealthy but she appears to have been thrifty. She cultivated her few acres of ground and kept a small store. The single daughter and sick daughter testified that for years and with almost unbroken regularity they had spent the summer with her, for which she made no charge; this was an annual contribution of just what it was worth in money for the benefit and comfort of these daughters; as they had for years received it, they had reasonable expectation of receiving it as long as the life and ability of the mother lasted; by her death they lost it. Why could not the jury from the evidence estimate what they had lost in money? True, it was only about one fourth of the yearly boarding of the two daughters, but it was as capable of computation as any of the elements of damages admissible in this class of cases. So as to the money and clothing contributed from time to time: these were capable of

[55] See sec. 800, herein. As bearing upon this question it is held that when a daughter attains majority a father's obligation to support her ceases and even though she thereafter becomes mentally incompetent to support herself, the father's obligation is not thereby revived. Mt. Pleasant Overseers v. Wilcox (Pa. Q. S.), 12 Pa. Co. Ct. 447; 2 Pa. Dist. R. 628. It is also held upon the general question that the question of dependent family relations existing between a father and his minor children rests upon the legal point whether they remain members of the same family without regard to the fact whether or not they live in the same house. In re Henkel's Estate; Appeal of Muller, 13 Pa. Super. Ct. 337.

§ 805. "Damages for the death"—"Pecuniarily suffered or sustained"—Reasonable expectation of pecuniary benefit.—The reasonable expectation of pecuniary advantage from the continued life of the person for whose death the action is brought may be considered as an element of damages.[57] And this in-

a valuation as certain as the tea and sugar contributed by Dalton to his parents when he visited them as stated in the leading case already cited (viz, Dalton v. South Eastern Ry. Co., 93 E. C. C. R. 296). As to Mrs. Schnatz, she testified that regularly for 16 years, in fall and spring, her mother sent her the potatoes used in her house for which she paid nothing; that she nursed her at times in illness, did sewing for her and performed like services. The jury might find from such evidence a reasonable expectation of future benefits of like value and character and thereby approximate a money loss. Of course all these benefits were gifts as distinguished from payments made or services rendered because of a legal obligation; . . . These statutes were not enacted to nurture sentiment; they are essentially sordid and must be so construed. They were passed to compensate in dollars those who had lost by death those pecuniary benefits which have their origin in the purest sentiment. The learned counsel for applicant is clearly right when he argues that occasional gifts made or services rendered by a parent to the daughters who had long before her death left her home and established homes of their own are not sufficient proof on which to found a pecuniary loss. The trouble here, however, is with this evidence which went much further than occasional gifts and services; it tended to show a persistent regularity of contribution for many years, so regular and unvarying as to justify a reasonable expectation of continuance. Nor were these gifts and services in view of the ability of the mother and the necessities of the children of trifling value; they must have very appreciably contributed to the comfort and health of those who were favored by them." Schnatz v. Philadelphia & R. R. Co., 160 Pa. 602; 34 W. N. C. 290; 28 Atl. 952, per Dean, J. In an action by a mother for death of her adult son, who was killed while a passenger on defendant's cars, it was declared that if the family relation existed and there were reasonable grounds to expect future pecuniary advantage from the continuance of this relation as in the past since arriving at age, the destruction of such expectations justifies a recovery. Pennsylvania R. Co. v. Keller, 67 Pa. St. 300.

[57] Stahler v. Philadelphia & R. R. Co., 199 Pa. 383. Action for benefit of three adult sons—death of father. Schnatz v. Philadelphia & R. R. Co., 160 Pa. 602; 34 W. N. C. 290; 28 Atl. 952. Action for benefit of three daughters—death of father. McHugh v. Schlosser, 159 Pa. 480; 28 Atl. 271; 39 Am. St. Rep. 699; 23 L. R. A. 574. Death of husband. Lehigh Irou Co. v. Rupp, 100 Pa. 95. Deceased minor son. North Pennsylvania R. Co. v. Kirk, 90 Pa. St. 15. Death of adult son. Pennsylvania R. Co. v. Keller, 67 Pa. St. 300. Deceased adult son. Pennsylvania R. Co. v. Adams, 55 Pa. St. 499. Deceased adult son. What he would probably have earned and which would have gone to his next of kin.

cludes what deceased would probably have given for the benefit of those entitled to recover,[58] and also the reasonable expectation of support which has been destroyed by the death of an adult son.[59] So a widow's chance of endowment is a factor to be considered.[60]

§ 806. "Damages for the death"—"Pecuniarily suffered or sustained"—Prospect of inheriting.—The expectation of inheritance is not a proper element of damages to be submitted to the jury in the case of adult children seeking a recovery for their father's death.[61]

§ 807. "Damages for the death"—"Pecuniarily suffered or sustained"—Physical and financial condition, age, number of family, etc., of beneficiaries.—In a Pennsylvania case the court considered the facts that the father of deceased owned a house and lot and was advanced in life.[62] So in another decision in that state it was in evidence and was also given consideration by the higher court that one of the surviving daughters was single and worked at small wages and lived alone; also that another daughter, also a beneficiary, was married and had suffered for years from a pulmonary disease and had gone at regular periods to her mother's house to recuperate her health.[63] But in an action for the benefit of children, whose father had been killed though defendant's negligence, the children's dependence upon their grandparents and the circumstances of those grandparents were decided to be irrelevant evidence and to have no bearing upon the true measure of damages.[64] Another ques-

Tully v. Philadelphia, W. & B. R. Co. (Del. Super. 1901), 50 Atl. 95.

[58] Pennsylvania Teleph. Co. v. Varnau (Pa.), 15 Atl. 624. See Schnatz v. Philadelphia & R. R. Co., 160 Pa. 602; 34 W. N. C. 290; 28 Atl. 952; McHugh v. Schlosser, 159 Pa. 480; 28 Atl. 271; 39 Am. St. Rep. 699; 23 L. R. A. 574. See opinion in this case in note to sec. 812, herein, as to nominal damages and see cases cited under sec. 808, herein.

[59] See cases in second preceding note, *ante*, also cases in secs. 803, 804, herein.

[60] Catawissa R. Co. v. Armstrong, 52 Pa. St. 282.

[61] Wiest v. City v. Philadelphia, 200 Pa. 148; 49 Atl. 891. See also sec. 822, herein.

[62] Pennsylvania R. Co. v. Adams, 55 Pa. St. 499. See sec. 803, herein.

[63] Schnatz v. Philadelphia & R. R. Co., 160 Pa. 602; 34 W. N. C. 290; 28 Atl. 952. See sec. 803, herein.

[64] Pennsylvania R. Co. v. Butler, 57 Pa. St. 335, 338.

tion, however, is presented in the matter of the admissibility of evidence as to the ages and number of children. And as aiding in the determination of this point, it is important that under the Pennsylvania Act of 1855, the children are entitled to participate in the damages, and that that statute requires that "the declaration shall state who are the parties entitled in such action."[65] As to deceased, however, his social surroundings[66] and in general his financial condition or status and probable accumulations and other factors in this connection are important.[67] In case, however, of a wife's death, the circumstances in life of the parties and the ages of the husband and wife have been considered.[68]

§ 808. "Damages for the death"—"Pecuniarily suffered or sustained"—Probable accumulations.—Probable accumulations of deceased may be considered in estimating the damages recoverable for his killing.[69] And this rule would include his probable net earnings, which would have gone to those entitled, or in other words, probable earnings which he would have left as his estate,[70] although the value of a life should not be limited by such accumulations,[71] nor does the rule include the op-

[65] Huntingdon & Broad Top R. Co. v. Decker, 84 Pa. 419. In this case deceased left a widow and two children. See extract from opinion in note to sec. 813, herein. The difference between the Pennsylvania and Delaware statute as to beneficiaries will be apparent from an examination of secs. 793, 794, 796, herein.

[66] Steinbrunner v. Pittsburgh & W. R. Co., 146 Pa. 504; 23 Atl. 239; 29 W. N. C. 173; 22 Pitts. L. J. N. S. 235.

[67] See secs. 799, 808, herein.

[68] Waechter v. Second Ave. Tract. Co., 198 Pa. St. 129; 47 Atl. 967.

[69] Mansfield Coal & C. Co. v. McEnery, 91 Pa. St. 185; 36 Am. Rep. 662; Pennsylvania R. Co. v. Butler, 57 Pa. St. 335; Catawissa R. Co. v. Armstrong, 52 Pa. St. 282; Pennsylvania R. Co. v. Henderson, 51 Pa. St. 315; Pennsylvania R. Co. v. McCloskey, 23 Pa. St. 526.

[70] Tulley v. Philadelphia & W. B. R. Co. (Del. Super. 1901), 50 Atl. 95; Croker v. Pusey & Jones Co. (Del. Super. 1900), 50 Atl. 61, 62, noted more fully in note to sec. 799, herein, where other cases in point are also cited, and see McHugh v. Schlosser, 159 Pa. 480, 485, 486; 28 Atl. 271; 39 Am. St. Rep. 699; 23 L. R. A. 574, and extract from opinion in this case in note to sec. 812, herein.

[71] "It would be wrong to limit the value of a man's life by his probable accumulations, for many men make none in a lifetime and many have arrived at an age when they no longer attempt to make any, and many women never make any, and yet every one is entitled to life and we have as yet discovered no stand-

portunities of acquiring wealth by a change of circumstances in life.[72] And in charging the jury to consider probable accumulations, it is erroneous to direct them that it would be a fair rule so to do, but if they could find a better rule they might adopt it and that it might not be fair to deduct family expenses. Such a charge gives the jury no definite measure of damages and leaves them at liberty to adopt any one they see fit; besides the loss is a pecuniary one based upon probable earnings computed from age, etc., of deceased,[73] but such accumulations may affect the chances of a wife's endowment.[74] Again, the jury may be charged that in estimating the pecuniary value of a deceased husband's life they must, if they can, fix a period in his life when if he had lived, he would have acquired property beyond his debts.[75]

§ 809. "Damages for the death"—"Pecuniarily suffered or sustained"—Expenses of sickness, funeral, etc.—In Delaware a husband as administrator cannot recover funeral expenses as part of the damages for his wife's death, notwithstanding the Code of that state makes administrators liable for such expenses as a demand against the estate.[76] In Pennsylvania, however, as we have elsewhere stated, the question is expressly made important whether or not the action is for the loss by death or merely a survival suit, and this affects the recovery.[77] The following decision is therefore pertinent: Thus it is determined that in an action by a parent to recover for loss occasioned by any injury to his minor child, the recovery is for the injury done him and not for that sustained by his child, nor for the loss or inconvenience to the other members of his family whose cares and burdens have been increased. The elements to be considered are the expenses which he has incurred or is likely to incur in the support of the child by reason of the injury and the loss of earnings, and where

ard for its valuation." Pennsylvania R. Co. v. McCloskey, 23 Pa. St. 526, 531, per Lowrie, J.

[72] Mansfield Coal & C. Co. v. McEnery, 91 Pa. St. 185; 36 Am. Rep. 662.

[73] Pennsylvania R. Co. v. Butler, 57 Pa. St. 335.

[74] Catawissa R. Co. v. Armstrong, 52 Pa. St. 282.

[75] Pennsylvania R. Co. v. Henderson, 51 Pa. St. 315.

[76] Wilcox v. Wilmington City R. Co. (Del. Super. Ct.), 2 Pennewill, 157; 44 Atl. 686.

[77] See sec. 800, herein.

duties are performed by other members of the family consisting merely of increased inconvenience and trouble and cost the plaintiff nothing and cause him no pecuniary loss, they do not constitute a ground of recovery. The expenses must be such as have actually been paid or such as in the judgment of the jury are reasonably necessary to be incurred. The plaintiff can recover nothing for the nursing and attendance of the members of his own household unless they are hired servants. The care of his wife and minor children in ministering to the needs of the injured is an ordinary office of affection and duty. It involves no legal liability of plaintiff and is, therefore, not the basis of a claim for expenses incurred. If, however, such increased attention caused a direct pecuniary loss by depriving plaintiff of services of other members of his family in his business, he could claim compensation on the same ground substantially as if he had been required to employ additional help.[78] And in an action by a father to recover damages resulting from the wrongful killing of a minor son, the expenses caused by the injury and death may be considered,[79] including the expenses of care and attention to deceased arising out of the injury, funeral expenses and medical services, if any.[80]

§ 810. "Damages for the death"—"Pecuniarily suffered or sustained"—Time lost by parent.—The value of the time lost by a parent, by reason of the accident, will be considered as a factor in estimating damages for the death of a minor son.[81]

§ 811. "Damages for the death"—"Pecuniarily suffered or sustained"—Life expectancy—Mortuary tables.—Life expectancy of deceased and of the beneficiaries constitutes, as we have stated elsewhere,[82] a proper evidential factor, whether the

[78] Woeckner v. Erie Elec. Motor Co., 187 Pa. 206; 43 W. N. C. 50; 41 Atl. 28; 3 Am. Neg. Rep. 602, per Fell, J., quoting from Goodhart v. Railroad Co., 177 Pa. St. 1, 10; 35 Atl. 192; 38 W. N. C. 545; 5 Am. & Eng. R. Cas. N. S. 364.

[79] Lehigh Iron Co. v. Rupp, 100 Pa. St. 95.

[80] Pennsylvania R. Co. v. Zebe, 33 Pa. St. 318, 330, per Thompson, J. See also Madara v. Pottsville Iron & S. Co., 160 Pa. 109; 28 Atl. 639.

[81] Madara v. Pottsville Iron & S. Co., 160 Pa. 109; 28 Atl. 639. See also Woeckner v. Erie Elec. Motor Co., 187 Pa. 206; 43 W. N. C. 50; 41 Atl. 28; 3 Am. Neg. Rep. 602, noted fully in sec. 809, herein.

[82] See sec. 799, herein.

action be a survival one[83] or for the death itself.[84] But there should be some evidence to establish the probability of life, if relied on, and in the absence thereof an instruction is at least erroneous which directs the jury to act upon the rule that a man will reach the ordinary age of sixty-five or seventy where he is in good health and thirty years old.[85] Where the character of life tables and their value as a basis from which to determine the expectancy of life are not shown, a witness will not be permitted to testify therefrom.[86] But where deceased's state of health, habits, social surroundings and the like are shown, the Carlisle mortality tables are competent evidence to be considered in connection therewith, as to the expectation of life of one killed by negligence.[87]

§ 812. "Damages for the death"—"Pecuniarily suffered or sustained"—Nominal damages.—Where the deceased was killed while a passenger on a railroad train of defendants and through their negligence, the rule was applied that the evidence must clearly show that the plaintiff did actually sustain pecuniary damage or loss, but that the precise amount in dollars and cents need not be proven.[88] Again, where an adult son was killed by the negligence of the servants of a railroad company, and the jury were charged that only nominal damages should

[83] Maher v. Philadelphia Tract. Co., 181 Pa. 391; 37 Atl. 571; 40 W. N. C. 477; 3 Am. Neg. Rep. 85.

[84] See sec. 799, herein.

[85] Dooner v. Delaware & H. Can. Co., 164 Pa. 17; 30 Atl. 269; 10 Am. & Eng. R. & Corp. Rep. 264.

[86] McKenna v. Citizens Natural Gas Co., 198 Pa. 31, following Kerrigan v. Pennsylvania R. Co., 194 Pa. 98; 44 Atl. 1069, a case of personal injury where Carlisle tables were shown. The McKenna case was an action for personal injuries and for loss of a wife in an explosion, the latter being killed.

[87] Steinbrunner v. Pittsburg & W. R. Co., 146 Pa. 504; 22 Pitts. L. J. N. S. 235; 29 W. N. C. 173; 23 Atl. 239, cited in Kerrigan v. Pennsylvania R. Co., 194 Pa. 98, 105, 106; 44 Atl. 1069, a personal injury case and considered herein under that heading. This last decision also holds that annuity tables are inadmissible in actions based on personal injuries. The decision is an important one.

[88] Pennsylvania R. Co. v. Keller, 67 Pa. St. 300. See also discussion by Thompson, C. J., in this case at p. 308, as to effect of Statute of 1868, noted in sec. 796 herein, as to pecuniary loss. See Schnatz v. Philadelphia & R. R. Co., 160 Pa. 602; 34 W. N. C. 290; 28 Atl. 952, per Dean, J. See extended note of this case in sec. 799, herein.

be given, the charge was held objectionable, since the destruction of a reasonable expectation of pecuniary advantage would sustain the action.[89] So where only a deceased wife's age, health, etc., were proven, the court sustained a refusal to charge that no pecuniary loss was shown; that the evidence failed to warrant the jury in finding substantial damages and that the verdict for plaintiff, if any, should be in a nominal sum.[90] But where a husband's death was occasioned by his being wrongfully ejected from a hotel while he was sick and his consequent exposure, no evidence was given to show his earning powers or habits of industry and thrift, and the court refused to charge the jury that "nothing more than nominal damages can be recovered," and it was decided that earning power or evidence on which it could be based should be given.[91] In this connection it is said, however, that life has by law a value for the loss of which the survivors have a right to be compensated in view of its circumstances and that in estimating it, the consideration that personal exertions

[89] North Pennsylvania R. Co. v. Kirk, 90 Pa. St. 15. See sec. 803, herein.

[90] Delaware, L. & W. R. Co. v. Jones, 128 Pa. St. 308; 18 Atl. 330. See this case in note to secs. 796, 814, herein.

[91] McHugh v. Schlosser, 159 Pa. 480; 28 Atl. 271; 39 Am. St. Rep. 699; 23 L. R. A. 574. The jury were told in the general charge that as the evidence fixed his age and gave information about his health and habits, they might from this data estimate his earning capacity and the pecuniary loss of the plaintiff. The court said that life has a value which the law will recognize since the acts of 1851 and 1855, and which the survivors entitled to sue may recover. "It is true that this value is to be fixed by the jury under all the circumstances and it is not necessarily limited to what is known as nominal damages. But it is also true that when the probable earnings of deceased are to be taken into account in fixing the damages, it is the duty of the plaintiff to show the earning power of the deceased or give such evidence in regard to his business, business habits and past earnings as may afford some basis from which earning capacity may be fairly estimated" (quoted as to this last part in McKenna v. Citizens Natural Gas Co., 198 Pa. 31, 40); "Pennsylvania R. Co. v. Zebe, 33 Pa. 318; Pennsylvania R. Co. v. Vanderveer, 36 Pa. 298. The true measure of damages is the pecuniary loss suffered without any solatium for mental suffering or grief, and the pecuniary loss is what deceased would probably have earned by his labor, physical and intellectual in his business or profession if the injury that caused death had not befallen him and which would have gone to the support of his family. In fixing this amount, consideration should be given to the age of deceased, his health, his ability and disposition to labor, his habits of living and his expenditures. Penn-

may ever be required of its possessor or the possible want of capacity in its possessor are not to be taken into account.[92]

§ 813. "Damages for the death" "Pecuniarily suffered or sustained"—Death of husband—Husband and father.—In Delaware, the measure of recovery by a widow for her husband's death is computed upon the money value of his life to her.[93] So although half the husband's earnings capitalized would only equal two thousand six hundred and thirty dollars, a verdict of seven thousand eight hundred dollars to a widow is not excessive.[94] So in Pennsylvania the damages also include all such service as a father could render of pecuniary value to his wife and children,[95] and in the last named state, although the widow may recover, yet she is not entitled to all the damages where there are children;[96] but under the act of 1855, the right

sylvania R. Co. v. Butler, 57 Pa. 335; Lehigh Iron Co. v. Rupp, 100 Pa. 95; Mansfield Coal & C. Co. v. McEnery, 91 Pa. 185;" McHugh v. Schlosser, 159 Pa. 480, 485, 486, per Williams, J.

[92] Pennsylvania R. Co. v. Keller, 67 Pa. St. 300, 308, per Thompson, C. J.

[93] Harkins v. Pullman Pal. Car Co. (U. S. C. C. D. Del.), 52 Fed. 724. See also Pennsylvania R. Co. v. Henderson, 51 Pa. St. 315, 321, per Read, J. See extract from opinion in sec. 803, herein. The factor of support being a material one, the following case is relevant. Thus it is held that a husband has legal grounds for leaving his wife, or that she is not fit to live with, will not excuse him from supporting her if the marriage relation still exists. State v. Tierney (Gen. Sess.), 1 Penn. (Del.) 116; 39 Atl. 774.

[94] Harkins v. Pullman Palace Car Co. (U. S. C. C. D. Del.), 52 Fed. 724.

[95] Mansfield Coal & C. Co. v. McEnery, 91 Pa. St. 185, 189, 190; 36 Am. Rep. 662.

[96] Allison v. Powers, 179 Pa. 531; 36 Atl. 333; 39 W. N. C. 522; 27 Pitts. L. J. N. S. 408. The act of 1855, "instead of confining the right of action to the widow and personal representatives designates four separate parties, to one of whom, according to the circumstances of each case, the right of action is given. If the deceased leaves a husband he alone is clothed with the right of action; if the wife is the survivor, she is entitled to bring suit; if there be neither surviving husband nor widow, the right of action is given to the children, and if there be neither husband nor widow nor children surviving, it is given to the parents of deceased. But while the right of action is given according to the circumstances of each case, to one of the four designated parties, it is clear from the wording of the act that the entire sum is not always to be retained by the plaintiff in his or her own right. It is to be distributed among the relatives named in the proportion they would be entitled to take the personal property of the deceased in case of

of action vested solely in the widow and the parents were not entitled to any part of the damages even though the deceased was a minor child, he having been married, emancipated and living apart from his parents. The question of emancipation, however, was immaterial in this case, as deceased was primarily bound to support his wife, even if it took all his earnings, and there could be no question but what his widow's rights were the same as if he had been of full age. Another consideration was that it did not appear that after his marriage he gave his parents any of his earnings,[97] and the widow's and children's reasonable expectations, based upon support or what deceased has given, or upon his earnings or probable accumulations will be considered,[98] as will also the general elements of damage such as age, etc.[99]

§ 814. "Damages for the death"—"Pecuniarily suffered or sustained"—Death of wife.—The loss of a wife's services constitutes an element of damages.[100] And in Delaware evidence is inadmissible which shows by way of special damages or generally the value of a wife's life independent of her husband, and while certain evidence as to her industry and saving

intestacy, and to the end that it may appear who are entitled to participate in the damages recovered, it is required that the declaration shall state who they are. In the present case the widow had the right of action not exclusively for her own use, but for the joint use and benefit of herself and children. She accordingly brought suit in her own name within the time limited by the act. Before the trial, the declaration was amended by naming the parties entitled to the damages claimed. It appears to us that this is the correct interpretation of the act and that the proceedings were regular. . . . The object of the act of 1855 was not to take away the right of action given to the widow by the act of 1851; on the contrary it recognizes her right and provides how the damages shall be distributed." Huntingdon & Broad Top R. Co. v. Decker, 84 Pa. St. 419, 426, per Sterrett, J. But see Pennsylvania R. Co. v. Ogier, 35 Pa. St. 60, and examine secs. 815–817, herein as to status and death of parents. As to who is widow, see Gross v. Electric Tract. Co. (C. P.), 18 Pa. Co. Ct. 295; Pa. Dist. R. 294. That statement or demand in action by widow must allege particular acts of negligence and affidavit must specify items of damage, see Childs v. Pennsylvania R. Co. (Pa. C. P.), 27 W. N. C. 510.

[97] Lehigh Iron Co. v. Rupp, 100 Pa. St. 95, per Trunkey, J. See sec. 803, herein.

[98] See secs. 803, 805, 808, herein.

[99] See sec. 799, herein.

[100] Pennsylvania R. Co. v. Goodman, 62 Pa. St. 329, per Agnew, J.

habits may be given, yet it must come within the rule of pecuniary loss sustained by him. In Pennsylvania, however, those habits and characteristics which render her services more valuable as a wife or as a wife and mother are proper factors for consideration, for the nature of the relation would place such services above that of a servant for hire and in this sense alone her companionship may, as we have stated elsewhere, be considered.[2] But it is well perhaps to again state in this connection, by way of a cautionary remark, that the loss of mere companionship of the wife and mother is not itself an element of damage in an action for her except as indicated above,[3] although what the value of her services was as a wife may be recovered. So in the absence of any rebutting evidence, the jury may and doubtless would infer that a deceased wife was an ordinarily industrious and useful wife, capable of discharging properly the duties of her position, and it need not be proven that she possesssed any specially or exceptionally good qualities "as with propriety he (plaintiff) might have done if the subject of his loss had been a horse or other animal, nor was it either necessary or proper that he should do so."[4]

§ 815. "Damages for the death"—"Pecuniarily suffered or sustained"—Death of parent.—All the children are entitled to share in the damages recovered by the widow in an action for the death of her husband.[5] And the fact that the children of deceased were married and did not reside with her, does not preclude a recovery based upon their reasonable expec-

[1] So held in Wilcox v. Wilmington City R. Co. (Del. Super.), 2 Pennewill, 157; 44 Atl. 686. See this case in note to sec. 799, herein. Jury can only give money value of wife's life to her husband. Waechter v. Second Ave. Tract. Co., 198 Pa. St. 129; 47 Atl. 967.

[2] Pennsylvania R. Co. v. Goodman, 62 Pa. St. 329, per Agnew, J. See his opinion in note to sec. 802, herein.

[3] Delaware, L. & W. R. Co. v. Jones, 128 Pa. 308; 18 Atl. 330.

[4] Delaware, L. & W. R. Co. v. Jones, 128 Pa. 308, 314, 315; 18 Atl. 330, per Sterrett, J. See also extract from opinion in this case under sec. 796, herein, as to pecuniary loss. See further secs. 797, 799, 802, 812, herein.

[5] Allison v. Powers, 179 Pa. 531; 36 Atl. 333; 27 Pitts. L. J. N. S. 408; 39 W. N. C. 522. See sec. 813, herein. But see Pennsylvania R. Co. v. Ogier, 35 Pa. St. 60; Snyder v. Philadelphia & R. R. Co. (Pac. P.), 9 Pa. Dist. Rep. 3.

tations of advantage. And the value to the surviving daughters of their mother's services in nursing them in sickness, sewing for them and the like, will be considered.[6] So a father's probable earnings are proper elements of damages.[7] And also in this connection his probable expenditures and habits of living may enter into the calculation of the loss sustained by minor children, since such expenditures may operate to limit the recovery by limiting what would have been accumulated and have gone to such children.[8] And the value of the life of the father, based upon a pecuniary estimate, is the general rule of damages.[9] So the children have an interest in the father's life, at least to the extent of their support, notwithstanding his indebtedness.[10] And if the action is by the widow and children, joint damages need not be proven to justify a joint recovery.[11] Other factors, such as age, etc.,[12] solatium,[13] reasonable expectation of pecuniary benefit,[14] probable accumulations and the like[15] are fully considered elsewhere herein.[16]

§ 816. "Damages for the death"—"Pecuniarily suffered or sustained"—Death of parent—Care, training, etc., of children.—The ability, character and business or other capacity of a parent, especially of a mother and those qualities which more especially fit her for the physical, moral and mental training, care of and attention to her children in a way which will enure to their future welfare, measured by a pecuniary standard, will be considered as an element of damages, viewed also from the standpoint that her services as a wife and mother are more valuable.[17]

[6] Schnatz v. Philadelphia & R. R. Co., 160 Pa. 602; 28 Atl. 252; 34 W. N. C. 296. See sec. 803, herein.

[7] Mansfield Coal & C. Co. v. McEnery, 91 Pa. St. 185; 36 Am. Rep. 662. See secs. 799, 808, herein.

[8] This may be implied from the general rule stated by the court in Pennsylvania R. Co. v. Butler, 57 Pa. St. 335, 338. See also secs. 799, 808, herein.

[9] North Pennsylvania R. Co. v. Robinson, 44 Pa. St. 175. See sec. 796, herein.

[10] Pennsylvania R. Co. v. Henderson, 51 Pa. St. 315. See secs. 803, 804, herein.

[11] North Pennsylvania R. Co. v. Robinson, 44 Pa. St. 175.

[12] See sec. 799, herein.

[13] See secs. 800–802, herein.

[14] See sec. 805, herein.

[15] See sec. 808, herein.

[16] See sec. 816, herein. See also Huntingdon & Broad Top R. Co. v. Decker, 84 Pa. St. 419, noted under sec. 813, herein.

[17] Delaware, L. & W. R. Co. v.

§ 817. "Damages for the death"—"Pecuniarily suffered or sustained"—Death of parent—Minority and majority of children.—In an action for the benefit of surviving children, the damages suffered by them through their parent's death may cover a period beyond such children's minority.[18]

§ 818. "Damages for the death"—"Pecuniarily suffered or sustained"—Death of child.—In determining the measure of damages in Pennsylvania for the negligent killing of a child the distinction between an action for the death itself and an action commenced before the death but carried on thereafter by the personal representative is very important, for a different rule governs the recovery. There is also apparently another distinction as to the basis of compensation, dependent upon whether the suit for the injury to the child is brought by the parent or by the child itself.[19] Another factor is the character of the family relations, and whether or not such dependent relations exist between the parent and child,[20] and this principle may be extended to the right of a deserted wife, to whose support and that of the family the husband has refused to contribute, to sue for the death of her child.[21] Notwithstanding the

Jones, 128 Pa. St. 308; 18 Atl. 330; Pennsylvania R. Co. v. Goodman, 62 Pa. St. 329. See extract from opinion of Agnew, J., in this case in note to sec. 802, herein.

[18] See Schnatz v. Philadelphia & R. R. Co., 160 Pa. 602; 28 Atl. 952; 34 W. N. C. 290.

[19] See secs. 800, 809, herein.

[20] See secs. 803, 804, herein.

[21] Kerr v. Pennsylvania R. Co., 169 Pa. St. 95; 32 Atl. 96; 36 W. N. C. 325, under Act, April 15, 1851. As the right of a father or mother to sue would ordinarily depend upon their respective right to services of the deceased child, the following is pertinent: Thus, a widowed mother need not show that she is supporting her minor child in order to recover his wages. Franz v. Riehl, 1 Lack. L. News, 253, 255; 2 Lack. L. News, 69; 13 Lanc. L. Rev. 197, 351; 5 Pa. Dist. Rep. 565; 4 id. 627; 26 Pitts. L. J. N. S. 401. See also on last point, Eustice v. Plymouth Coal Co., 120 Pa. 299. Father and mother alleging that they are such and the nearest relatives, need not aver that child was unmarried and left neither widow and child. Sherry v. Operative Plasterers' Mut. Un., 139 Pa. 470; 20 Atl. 1062. If the father dies pending suit for the loss of his minor child, his administrator may be substituted as plaintiff. Haggerty v. Borough of Pittston (Pa. C. P.), 9 Kulp, 575, under Act, April 15, 1851, sec. 19. If the father dies after suit brought, widow and mother may intervene and discontinue action. Doran v. Avoca Coal Co. (Pa. C. P.), 9 Kulp, 479. If child is illegitimate, mother cannot recover.

implied exclusion which is perhaps involved in this principle as to a mother's right to her child's services, it is decided that a widow's statutory right to sue for her child's death exists.[22] Where, however, a right of action accrues to a parent for the death of a minor child, the damages are compensatory only,[23] although certain expenses may be included,[24] and in determining the amount of compensation the loss of services and their value[25] may be considered. The measure of recovery may therefore rest upon probable earnings of the deceased during minority, less the cost of maintenance for said period,[26] and his earning capacity, as well as the cost of support during the remaining years of his minority may rest upon an average periodical sum shown by the evidence.[27] Other elements of damages may be proven, such as age, etc., elsewhere herein considered.[28]

§ 819. "Damages for the death"—"Pecuniarily suffered or sustained"—Death of child—Minority and majority.—Recovery of damages for the wrongful death of a minor child is limited to its minority in Pennsylvania, the chances of survivorship, his ability and willingness after he should become of age to support others being matters too vague to enter into an

Harkins v. Phila. & R. R. Co., 15 Phila. 286.

[22] Pennsylvania R. Co. v. Bantom, 54 Pa. St. 495.

[23] Lehigh Iron Co. v. Rupp, 100 Pa. St. 95, 99, death of son. See secs. 796, 797, herein.

[24] See sec. 809, herein.

[25] Caldwell v. Brown, 53 Pa. St. 453, 459; North Pennsylvania R. Co. v. Robinson, 44 Pa. St. 175. This last case also mentions companionship, but see sec. 802, herein. Pennsylvania R. Co. v. Zebe, 33 Pa. St. 318; Lehigh Iron Co. v. Rupp, 100 Pa. 95. See Pennsylvania R. Co. v. Henderson, 57 Pa. St. 315. As to damages being limited to minority, see sec. 817, herein.

[26] Madara v. Pottsville Iron & S. Co., 160 Pa. 109; 28 Atl. 639.

[27] Deceased was 14 years old. The average daily earning capacity of a boy from that age to majority was shown to be from 75 to 90 cents, while the daily cost of his support was 40 to 60 cents—$1,250 not excessive. Pennsylvania Coal Co. v. Nee (Pa.), 13 Atl. 841, and Annot.; 12 Cent. 524.

[28] See secs. 799, 803, 804, 805, 819, herein. As to advice of adult son, see sec. 802, herein. See as to death of child the following cases considered under the above referred to sections: Stahler v. Philadelphia & R. R. Co., 199 Pa. 383; Lehigh Iron Co. v. Rupp, 100 Pa. 95; North Pennsylvania R. Co. v. Kirk, 90 Pa. St. 15; Pennsylvania R. Co. v. Keller, 67 Pa. St. 300; Pennsylvania R. Co. v. Adams, 55 Pa. St. 499; Pennsylvania R. Co. v. Zebe, 33 Pa. St. 318, 330.

estimate of an award of damages merely compensatory.[29] But it may be inferred from the decisions concerning the actual relations existing between the parent and child and the doctrine of reasonable expectation of pecuniary benefit destroyed by the minor's death, that this rule above given might be subject perhaps to qualification.[30] We do not, however, urge this point in view of the express declaration of the rule in the case which we have relied on above. We merely make the suggestion and there let it rest. In an action, however, to recover the loss occasioned by an adult child's negligent killing, the facts in evidence may warrant an award of damages based upon an expectation of continued aid, as where such adult had clearly shown an intent to assist or support his parents in the future.[31]

§ 820. "Damages for the death"—"Pecuniarily suffered or sustained"—Defenses in general.—The fact that deceased had said he was tired of life, that he did not want to live, that his life had been a failure and that his family was a failure may be shown by defendant, as it has a bearing on the value of decedent's life to his family, and of his probable care for its preservation.[32] So a statement of plaintiff's intestate made after the injury occurred is admissible against her.[33]

§ 821. "Damages for the death"—"Pecuniarily suffered or sustained"—Mitigation—Insurance.—The damages in an action for the death of a person cannot be reduced by the amount received under an insurance policy on deceased's life.[34]

[29] Lehigh Iron Co. v. Rupp, 100 Pa. St. 95, 98, 99, per Trunkey, J., citing Caldwell v. Brown, 58 Pa. St. 453. See also id. 459; Madara v. Pottsville Iron & S. Co., 160 Pa. 108; 28 Atl. 639; Pennsylvania R. Co. v. Bantom, 54 Pa. St. 495; Pennsylvania R. Co. v. Zebe, 33 Pa. St. 818.

[30] See secs. 803, 804, herein.

[31] Pennsylvania R. Co. v. Adams, 55 Pa. St. 449. See Lehigh Iron Co. v. Rupp, 100 Pa. St. 95, opinion of Trunkey, J. See also secs. 803, 804, 805, herein, and as to advice of adult son, see sec. 802, herein.

[32] Disbrow v. Ulster (Pa. Supreme Ct. 1887), 8 Atl. 912; 7 Cent. 827. Action was by widow for husband's death, killed by fall from highway. The above in brief includes substantially all the opinion, for there is no discussion, and a judgment of $100 is affirmed.

[33] Hughes v. Delaware & H. Canal Co., 176 Pa. 254; 35 Atl. 190; 38 W. N. C. 393.

[34] Coulter v. Pine Twp., 164 Pa. 543; 30 Atl. 490; 35 W. N. C. 399; 25 Pitts. L. J. N. S. 135; North Pennsylvania R. Co. v. Kirk, 90 Pa. St. 15.

§ 822. "Damages for the death"—"Pecuniarily suffered or sustained"—Mitigation of damages—Inheritance.—The fact that children have inherited an estate by the death of their father cannot be shown upon the question of damages in an action to recover compensation for his wrongful killing. This rule rests by analogy upon the determination that insurance upon deceased's life is irrelevant evidence to reduce the amount of recovery, there being no difference in the principle.[35]

§ 823. "Damages for the death"—"Pecuniarily suffered or sustained"—Marriage and remarriage.—Where a husband seeks recovery for the killing of his wife to whom he was married before the injury, which resulted in her death, a daughter who was married before her father's marriage cannot give evidence concerning her support before that time.[36] But the fact that the widow suing for the recovery married deceased after the injury, does not preclude her recovery for her husband's death.[37] And her remarriage after suit brought cannot operate to reduce the damages, even though her second husband is living.[38]

[35] Stahler v. Philadelphia & R. R. Co., 199 Pa. 383, 386, per Weand, J. (16 Montg. Co. Law. Repr. 198), citing as to insurance, North Pennsylvania R. Co. v. Kirk, 90 Pa. St. 15; Coulter v. Pine Township, 164 Pa. 543.

[36] Wilcox v. Wilmington City R. Co. (Del. Super.), 2 Pennewill, 157; 44 Atl. 686.

[37] Gross v. Electric Tract. Co., 180 Pa. 99; 36 Atl. 424, under Act, April 15, 1851; *S. C.* (Pa. C. P.), 5 Pa. Dist. R. 294; 18 Pa. Co. Ct. 29. In this case the widow had for seven years lived with her husband and was married to him only a few days before his death.

[38] Philpott v. Pennsylvania R. Co., 175 Pa. 570; 34 Atl. 856, cited in Gulf, Colo. & S. F. R. Co. v. Younger, 90 Tex. 387; 38 S. W. 1121; 1 Am. Neg. Rep. 378. See also as to marriage of children, secs. 803, 804, herein.

CHAPTER XXXV.

DEATH—DAMAGES SUSTAINED.

§ 824 Damages sustained—Statutes.
825. Damages sustained—Pecuniary loss.
826. Damages sustained—Exemplary damages.
827. Damages sustained—Jury and instructions.
828. Damages sustained—General elements of damage.
829. Damages sustained—Sufferings of person injured.
830. Damages sustained—Solatium—Mental suffering—Loss of society, etc.
831. Damages sustained—Relations, legal and actual, of deceased to beneficiaries—Support and dependency.
832. Damages sustained—Reasonable expectation of pecuniary benefit.
833. Damages sustained—Physical and financial condition—Age, number, etc., of beneficiaries.
834. Damages sustained—Life expectancy and mortality tables.
835. Damages sustained—Nominal damages.
836. Damages sustained—Death of husband—Husband and father.
837. Damages sustained—Death of parent.
838. Damages sustained—Death of child.
839. Damages sustained—Collateral kindred.
840. Damages sustained—Defenses—Mitigation of damages—Contributory negligence.
841. Damages sustained—Former marriage.

§ 824. Damages sustained—Statutes.—The Florida statute provides for the recovery of "such damages as the party or parties entitled to sue may have sustained by reason of the death," whenever the death is caused by wrongful act, negligence, carelessness or default, such as would, if death had not ensued, have entitled the party injured to maintain an action for damages in respect thereof,[1] and the liability exists even

[1] Rev. Stat. Fla. 1892, secs. 2342–2344; Laws, 1883, ch. 3439, No. 27, sec. 1, Feb. 28, 1883. Examine Florida, C. & P. R. Co. v. Foxworth, 41 Fla. —; 25 So. 338; 13 Am. & Eng. R. Cas. N. S. 469.

though the death shall have been caused under such circumstances as make it in law a felony. The surviving widow[2] or husband may sue or if there be neither, then the minor child or children, or if there be none, then any person or persons dependent on deceased for support.[3] If none of the above persons exist, then the executor or administrator may maintain the action, and where the person is under twenty-one years of age, the action must be brought by and in the name of the next friend. Individuals and corporations may be liable.[4] There are also other enactments in this state which declare and limit the right of a person injured by a railway company to recover damages for the wrongful act, and these statutes[5] may apply to actions under the death statute above mentioned.[6] In Louisiana, the statute provides for the recovery of "the damages sustained" by the death of the parent, or child, or husband, or wife and "every act whatever of man that causes damage to another obliges him by whose fault it happened to repair it."[7] The

[2] Florida, C. & P. R. Co. v. Foxworth, 41 Fla. —; 25 So. 338; 13 Am. & Eng. R. Cas. N. S. 469.

[3] See Duval v. Hunt, 34 Fla. 85; 15 So. 876.

[4] See citations under first note to this section. Fla. Acts, 1884, ch. 3439, No. 27; Fla. Act, Feb. 28, ch. 3438; Rev. Stat. 1892, secs. 2342–2344.

[5] See citations under first note to this section. Fla. Acts, 1887, ch. 3744, sec. 1; Acts, 1891, ch. 4071, sec. 2.

[6] Florida, C. & P. R. Co. v. Foxworth, 41 Fla. —; 25 So. 338; 13 Am. & Eng. R. Cas. N. S. 469, as to employee and the necessity of qualifying an instruction to the jury, under act of 1891, ch. 4071. As to apportionment of damages, see Florida, C. & P. R. Co. v. Mooney, 40 Fla. 17; 24 So. 148; 12 Am. & Eng. R. Cas. N. S. 721. Action for personal injuries abates upon death of plaintiff in Florida under McClellan's Dig. p. 830, sec. 27; Jacksonville St. R. Co. v. Chappell, 22 Fla. 616; 1 So. 10.

[7] Merrick's Rev. Civ. Code, La. 1900, art. 2315 (2294). It is a public governmental duty of a municipal corporation to protect life, and for a failure to perform such duty a city is not liable in the absence of a statute. Gianfortone v. New Orleans (U. S. C. C. E. D. La.), 61 Fed. 64; 24 L. R. A. 592. It is also held in this case that a city is liable for the killing of a person by a mob, under a statute imposing a liability for the destruction of property. Where a member of a jury in charge of a sheriff's deputy fell into an unguarded pit on his way to a water-closet and was killed, it was held that the sheriff was not liable where the deputy only ordered the jury to go further from the courthouse when they asked permission to go to the water-closet. Sherman v. Parish of Vermilion, 51 La. Ann. 880; 25 So. 538. Where a city failed to prevent the killing of a person, said city and the one who did the killing may be joined in an action

right of action survives in favor of the minor children or widow or either of them and in default of these in favor of the surviving father and mother or either of them.[8] This statute is, however, the result of several amendments,[9] which is a most important fact in determining the value, weight and applicability of the decisions in that state.[10]

§ 825. Damages sustained—Pecuniary loss.—It is intimated in a Louisiana case that only the pecuniary loss is recoverable, and it is also declared that the object of the statute is compensation,[11] and it is further decided that the right to compensatory

by the widow. Comitez v. Parkerson (U. S. C. C. E. D. La.), 50 Fed. 170. As to nonremoval of suit against a railroad company into the Federal court, where the recovery is for killing of plaintiff's son, where defendant is a consolidated company holding franchises in several states, see Duncas v. St. Louis, I. M. & S. R. Co., 49 La. Ann. 1700; 22 So. 924; 7 Am. & Eng. Corp. Cas. N. S. 557, an important decision citing numerous cases.

[8] See Hamilton v. Morgan's L. & T. R. & S. S. Co., 42 La. Ann. 824; 8 So. 586. See secs. 825, 826, herein. As to nonsurvival in case of death of father after suit brought but before judgment, see Chivers v. Rogers, 50 La. Ann. —; 23 So. 100; Vincent v. Sharp, 9 La. Ann. 463, dist'd.

[9] Merrick's Rev. Civ. Code, 1900, art. 2315 (2294); La. Rev. Civ. Code, 1889, art. 2315; La. Acts, 1884, No. 71, p. 94; La. Rev. Stat. 1857, p. 79, sec. 18; La. Acts, 1855, p. 70.

[10] In 1884 the statute gave the right of action for the death. This was a departure from the then existing statute as amended in 1855, since by the 1855 act, the right of action survived to the persons above specified in the text herein, in case the injury resulted in death. These amendments materially affected the character of the damages to be awarded and the defenses which might be availed of, especially so by the amendment of 1884. These differences will appear under the sections herein relating to damages for sufferings of the party injured (sec. 829) and to defenses (sec. 840). Examine also Chivers v. Rogers, 50 La. Ann.—; 23 So. 100; Hamilton v. Morgan's L. & T. R. & S. S. Co., 42 La. Ann. 824; 8 So. 586; McFee v. Vicksburg, S. & P. R. Co., 42 La. Ann. 790; 6 So. 720; Myhan v. Louisiana Elect. L. & P. Co., 41 La. Ann. 964; 6 So. 797; 7 L. R. A. 172; 17 Am. St. Rep. 436; Van Amburg v. Vicksburg, S. & P. R. Co., 37 La. Ann. 651; Vredenbrugh v. Beehan, 33 La. Ann. 627; Weeks v. New Orleans & C. R. Co., 32 La. Ann. 615; McCubbin v. Hastings, 27 La. Ann. 713; Frank v. New Orleans & C. R. Co., 20 La. Ann. 27; Earhart v. New Orleans & C. R. Co., 17 La. Ann. 243; Hermann v. New Orleans & C. R. Co., 11 La. Ann. 5; Vincent v. Sharp, 9 La. Ann. 463; Hubgh v. New Orleans, 6 La. Ann. 495; 54 Am. Dec. 565. The right of action is not transmissible in case of the death of ancestor. In this respect it is personal and not a property right. Huberwald v. Orleans R. Co., 50 La. Ann. 477; 23 So. 474.

[11] McFee v. Vicksburg, S. & P. R.

damages survives, while that to punitive damages does not, so that the latter are excluded.[12] It seems, however, that the character of the action, whether it is a survival action or for the death itself,[13] is of some importance, as well also as the point whether the death was instantaneous.[14] And the relative weight of the several decisions should be considered in the light of different statutory amendments which affect the nature of the action in that state.[15]

§ 826. Damages sustained—Exemplary damages.—In case of a railroad employee's death occasioned by a defective roadbed, there can be no recovery of exemplary damages in the absence of wilful or outrageous negligence or malice.[16] So the right to punitive damages does not survive for an injury, for such right is a personal one.[17] In the decision, however, upon which the last rule rests, the evidence did not show that deceased sustained actual damages and the death was instantaneous, and it seems that the right of action survived nevertheless, but such survival evidently does not carry with it the right to exemplary damages.[18]

§ 827. Damages sustained—Jury and instructions.—Inasmuch as it is impossible in at least a majority of cases to estimate exactly what will be an adequate compensation for the loss by death, the admeasurement of damages rests largely in the jury's discretion, although their award is subject to review by the court.[19] It is decided however, in Florida, that it is error to charge the jury that the amount of recovery is incapable of exact determination and must be left largely to the jury's dis-

Co., 42 La. Ann. 790; 7 So. 720, per Breaux, J.

[12] Hamilton v. Morgan's L. & T. R. & S. S. Co., 42 La. Ann. 824; 8 So. 586. See sec. 826, herein.

[13] See sec. 829, herein, as to sufferings of deceased.

[14] See Cheatham v. Red River Line (U. S. D. C. E. D. La.), 56 Fed. 248. See secs. 902–910, herein, as to instantaneous death.

[15] See sec. 824, herein.

[16] McFee v. Vicksburg, S. & P. R. Co., 42 La. Ann. 790; 7 So. 729.

[17] Hamilton v. Morgan's L. & T. R. & S. S. Co., 42 La. Ann. 824; 8 So. 586. See Westerfield v. Lewis, 9 So. 52.

[18] See Erslew v. New Orleans & N. E. R. Co., 49 La. Ann. 86; 21 So. 853.

[19] Myhan v. Louisiana E. L. & P. Co., 41 La. Ann. 964; 6 So. 799; 7 L. R. A. 172; 17 Am. St. Rep. 436; Frank v. New Orleans & C. R. Co., 20 La. Ann. 25.

cretion, since it authorizes it to give as damages the value of deceased's life instead of the statutory allowance of the damages sustained.[20] It is also error to direct the allowance of gross probable earnings to the widow.[21]

§ 828. Damages sustained—General elements of damages.—Deceased's age, life expectancy, sex, health and strength, habits, character, disposition, occupation, earnings and disposition thereof and probable change of circumstances are all elements of damage.[22] In Florida the general elements of damages are based upon deceased's earnings, including his probable future earnings, his probable future station or condition in life or

[20] Florida, C. & P. R. Co. v. Foxworth, 41 Fla. —; 25 So. 338; 13 Am. & Eng. R. Cas. N. S. 469. See as to instruction as to apportionment of damages, Florida, C. & P. R. Co. v. Mooney, 40 Fla. 17; 24 So. 148; 12 Am. & Eng. R. Cas. N. S. 721. A case under Fla. Act, 1891, chap. 4071. See as to effect of this statute and death loss act, sec. 824, herein.

[21] Florida, C. & P. R. Co. v. Foxworth, cited last preceding note.

[22] Deceased was a stevedore employee 50 years old. He earned fifty cents an hour while he worked. The amount of his earnings was, however, left indefinite by the evidence. He left a wife and family—$1,500 was recovered. Boden v. Demwolf (U. S. D. C. E. D. La.), 56 Fed. 846. Deceased was a child 3½ years old. Rice v. Crescent City R. Co., 51 La. Ann. 108; 24 So. 791. Deceased son was 19 years old. He was strong and vigorous. He was negligently knocked from a car and died soon afterwards. Erslew v. New Orleans & N. E. R. Co., 49 La. Ann. 86; 21 So. 153. Deceased husband was 62 years old and was a wagon driver; earnings and life expectancy were also considered—$7,500 reduced to $1,000. Cline v. Crescent City R. Co. (La. Ann.), 9 So. 122. Deceased was an infant and was instantly killed. Hamilton v. Morgan's L. & T. R. & S. S. Co., 42 La. Ann. 824; 8 So. 586. Deceased adult son's age and disposition of earnings considered. McFee v. Vicksburg, S. & P. R. Co., 42 La. Ann. 790; 7 So. 720. Deceased was between 18 and 19 years old; a dutiful son, robust and earned $25 monthly. The disposition of his wages and probable change of his circumstances was also considered—$2,000 was recovered. Myhan v. Louisiana Elec. L. Co., 41 La. Ann. 964; 6 So. 699; 7 L. R. A. 172; 17 Am. St. Rep. 436. See opinion in sec 837, herein. Action for death of husband and father brought by widow and as mother and as natural tutrix of deceased's minor children. Deceased was about 50 years old and had a wife and four children. His wages were 50 cents an hour when he worked. The testimony as to the facts, showing the value of his life, went but little beyond this outline. The amount of earnings was left indefinite. $1,500 was awarded upon grounds stated generally in Cheatham v. Red River Line, 56 Fed. 248; Boden v. Demwolf (U. S. D. C. E. D. La.), 56 Fed. 846.

society with reference to his past history, his present and future business prospects and reasonable expectations of success, his other acquisitions and his life expectancy, and where a wife or mother survives, the joint lives of deceased and the survivor should be considered, as may also his character, habits and conduct. The fact also that the life expectancy of the widow is greater than that of deceased is important.[23]

§ 829. Damages sustained—Sufferings of person injured. —Pain and suffering of the deceased are not elements of damage in Florida, even though the action is brought for the death of one killed upon a railroad.[24] In Louisiana, however, there are two certain factors to be considered and those are the damages to the injured party and those caused by his death, for whenever the act of man causes injury to another the right of action survives in case of death, and the survivors may also recover damages sustained by them by the death.[25] And the right to recover for deceased's pain and sufferings has been held not to exist where the character of the death is such as to come within what may be designated as instantaneous.[26] Nor does an injury which will justify the allowance of punitive damages survive, although the right to compensatory damages does survive.[27] But it is also decided that recovery may be had for deceased's sufferings, where his limbs were badly mangled from being negligently knocked off a car and he died soon thereafter.[28]

[23] Florida, C. &. P. R. Co. v. Foxworth, 41 Fla. —; 25 So. 338; 13 Am. & Eng. R. Cas. N. S. 469. In Duval v. Hunt, 34 Fla. 85; 15 So. 876, the joint expectancy of the lives of a mother and deceased were factors. See sec. 183, herein.

[24] Florida, C. & P. R. Co. v. Foxworth, 41 Fla. —; 25 So. 338; 13 Am. & Eng. R. Cas. N. S. 469. See sec. 824, herein.

[25] See Westerfield v. Lewis (La.), 9 So. 524. See sec. 824, herein.

[26] The sufferings of a drowning man after he fell into the water, and before he died, cannot be considered, since they are substantially contemporaneous with his death. Cheatham v. Red River Line (U. S. D. C. La.), 56 Fed. 248, rev'd Red River Line v. Cheatham (U. S. C. C. A. La.), 60 Fed. 517; 9 C. C. A. 124. As to recovery before amendment of statute, see Van Amburg v. Vicksburg, S. & P. R. Co., 37 La. Ann. 651; 55 Am. Rep. 517.

[27] Hamilton v. Morgan's L. & T. R. & S. S. Co., 42 La. Ann. 824; 8 So. 586.

[28] Erslew v. New Orleans & N. E. R. Co., 49 La. Ann. 86; 21 So. 153. See Weeks v. New Orleans & C. R. Co., 32 La. Ann. 615; Vredenburg v. Behan, 33 La. Ann. 627; McCubbin

And, under another decision, pain and suffering of the deceased are elements of damages.[29]

§ 830. Damages sustained—Solatium—Mental suffering—Loss of society, etc.—Loss of the comfort and presence of a son,[30] and of the comfort, society and protection of a husband, are elements of damage.[31] It is also intimated in a Louisiana case that there can be no recovery for mental suffering or pain on the part of the survivor entitled to sue.[32]

§ 831. Damages sustained—Relations, legal and actual, of deceased to beneficiaries—Support and dependency.—The legal obligation to support a wife enters into the determination of what benefits she has lost by her husband's death, so her legal right to dower in his estate may be an element of damage, and the actual marital and family relations will also be considered, although these factors are not the sole basis of recovery for both the deceased's and the survivor's reasonable expectations as to the future are proper elements in ascertaining the damages sustained.[33] In the case of dependents, the Florida statute[34] has a special provision entitling them to a recovery, but in order to maintain an action they must show affirmatively the nonexistence of any other person entitled to a precedent right to sue. Relationship is not regarded as to such dependents. The dependency must exist with reference to age or nonage, mental or physical incapacity, lack of property or financial means or in case of adults, actual inability to support themselves, and actual reliance upon deceased for support, coupled with a reasonable expectation thereof.[35] Thus where a surviving

v. Hastings, 27 La. Ann. 713; Frank v. New Orleans & C. R. Co., 20 La. Ann. 27; Earhart v. New Orleans & C. R. Co., 17 La. Ann. 243.

[29] Towns v. Vicksburg, S. & P. Co., 37 La. Ann. 630; 55 Am. Rep. 508.

[30] Erslew v. New Orleans & N. E. R. Co., 49 La. Ann. 86; 21 So. 153; Myhan v. Louisiana E. L. & P. Co., 41 La. Ann. 964; 6 So. 799; 7 L. R. A. 172; 17 Am. St. Rep. 436, per Bernudez, C. J.

[31] Florida, C. & P. R. Co. v. Foxworth, 41 Fla.—; 25 So. 338; 13 Am. & Eng. R. Cas. N. S. 469.

[32] McFee v. Vicksburg, S. & P. R. Co., 42 La. Ann. 790; 7 So. 720, per Breaux, J.

[33] Florida, C. & P. R. Co. v. Foxworth, 41 Fla.—; 25 So. 338; 13 Am. & Eng. R. Cas. N. S. 469.

[34] See sec. 831, herein.

[35] Duval v. Hunt, 34 Fla. 85; 15 So. 876.

mother was dependent upon deceased, such expectation of support should be considered.[36] In Louisiana, in case of a son's death, the assistance given his parents out of his wages constitutes a material factor.[37] So the fact that a deceased adult son had lived with his mother and had contributed to her support and to that of her daughters is relevant upon the amount of compensation,[38] and necessarily these decisions which allow damages for the loss of society, presence or comfort of deceased,[39] must involve a consideration of the actual family or social relations between deceased and those entitled to recover, and in this connection the fact that deceased was a dutiful son would be an evidential factor.[40]

§ 832. Damages sustained—Reasonable expectation of pecuniary benefit.—In determining the measure of compensation or the damages sustained, the recovery may include whatever the person entitled might reasonably have expected to receive,[41] and in this connection deceased's reasonable expectations in the future as well as his present and future prospects, relative to success in his occupation may be considered.[42]

§ 833. Damages sustained—Physical and financial condition—Age, number, etc., of beneficiaries.—The Florida statute provides for a recovery by the widow or husband, then by the minor child or children, then by persons dependent upon deceased for support. It is evident, therefore, in that state that that dependency which involves the financial, physical and mental condition of the beneficiaries constitutes a factor in the estimation of damages or at least in determining who are entitled to recover as dependents.[43] In Louisiana, the survivors who are

[36] Duval v. Hunt, 34 Fla. 85; 15 So. 876.

[37] Erslew v. New Orleans & N. E. R. Co., 49 La. Ann. 86; 21 So. 153; Myhan v. Louisiana E. L. & P. Co., 41 La. Ann. 964; 6 So. 799; 7 L. R. A. 172; 17 Am. St. Rep. 436.

[38] McFee v. Vicksburg, S. & P. R. Co., 42 La. Ann. 790; 7 So. 720.

[39] See sec. 830, herein.

[40] See Myhan v. Louisiana E. L. & P. Co., 41 La. Ann. 964; 6 So. 799; 7 L. R. A. 172; 17 Am. St. Rep. 436.

[41] Florida, C. & P. R. Co. v. Foxworth, 41 Fla. —; 25 So. 338; 13 Am. & Eng. R. Cas. N. S. 469; Duval v. Hunt, 34 Fla. 85; 15 So. 876. See sec. 830, herein.

[42] Florida, C. & P. R. Co. v. Foxworth, 41 Fla. —; 25 So. 338. See sec. 828, herein.

[43] Duval v. Hunt, 34 Fla. 85; 15 So. 876. See secs. 828, 831, herein.

entitled to recover, are first, the minor children or widow, then the surviving father or mother, and where the question was whether or not the damages awarded were excessive, the court considered that deceased left a wife and four children.[44] And in another case the surviving mother's financial condition and indebtedness, and also the number and sex of her children and the age of the younger were in evidence.[45] Again, the surviving father's financial condition, evidenced by the amount of his earnings, the necessary demands thereon by his family and the number and condition of his children were evidential factors.[46]

§ 834. Damages sustained—Life expectancy and mortality tables.—We have seen that the life expectancy of deceased and of the survivors constitutes a material factor in awarding damages for the loss sustained by death,[47] and in determining this life expectancy, mortuary tables in approved use are proper evidence.[48]

§ 835. Damages sustained—Nominal damages.—Although the person suing may not be entitled to actual damages, yet in case of a father, who under the facts connected with the accident had cause to seek judicial investigation as to the death of his child, the court on appeal may assess nominal damages by virtue of its equity powers in order to save costs to the plaintiff.[49] And it seems that nominal damages may be given for the death loss even though there is no evidence of damages.[50]

§ 836. Damages sustained—Death of husband—Husband and father.—The widow cannot be awarded the full amount of her deceased husband's probable future earnings, nor may the jury give as damages the value of his life. But she may

[44] Boden v. Demwolf (U. S. D. C. E. D. La.), 56 Fed. 846.

[45] McFee v. Vicksburg, S. & P. R. Co., 42 La. Ann. 790; 7 So. 729.

[46] Myhan v. Louisiana E. L. & P. Co., 41 La. Ann. 964; 6 So. 790; 7 L. R. A. 172; 17 Am. St. Rep. 436.

[47] See sec. 828, herein.

[48] Duval v. Hunt, 34 Fla. 85; 15 So. 876.

[49] Hamliton v. Morgan's L. & T. R. & S. S. Co., 42 La. Ann. 824; 8 So. 586. Actual damages to the child was not shown. That averments of negligence and of absence of contributory negligence states cause of action, see Helm v. O'Rourke, 46 La. Ann. 178; 15 So. 400.

[50] Westerfield v. Lewis (La.), 9 So. 52.

recover the damages sustained or a reasonable compensation for the loss of that support to which she was legally entitled. There may also be included a compensation for her reasonable expectations in the way of receiving dower or legacies from her husband's estate when she has an expectation of longer life than he. A further element of damages is the loss of his comfort, protection and society, having in view their marital and social relations, his habits, character and conduct prior to and at the time of his death. Other elements, such as age, etc., constitute the basis of recovery.[51] The widow's right to a recovery does not rest alone upon the death loss act, but that statute includes the right of recovery under the railway injuries enactment.[52]

§ 837. Damages sustained—Death of parent.—In Louisiana the right of action for injuries resulting in death cannot be availed of by children who are of age, since it is limited to the designated survivors, being given to the minor heirs or widow. And the fact that such child was a minor at the time of his father's death does not aid him, for where he was of full age at the time the suit was commenced he is precluded.[53] In case of a father's death by drowning, the minor children's measure of damages is limited to the loss in their deprivation.[54] Other elements of damage, such as age, etc., of deceased, his physical suf-

[51] Florida, C. & P. R. Co. v. Foxworth, 41 Fla. —; 25 So. 338; 13 Am. & Eng. R. Cas. N. S. 469. As to age, etc., see also sec. 828, herein. That no recovery for husband's pain and suffering, see sec. 829, herein.

[52] Florida, C. &. P. R. Co. v. Foxworth, 41 Fla. —; 25 So. 338; 13 Am. & Eng. R. Cas. N. S. 469; Fla. Acts, 1887, ch. 3744, sec. 1; Acts, 1891, ch. 4071, sec. 2; Fla. Acts, 1883, ch. 3439. Widow may join as defendants the person killing and a city which failed to prevent it. Comitez v. Parkerson (U. S. C. C. E. D. La.), 50 Fed. 170. Widow's petition for husband's death states a cause of action where it avers negligence and absence of contributory negligence. Helm v. O'Rourke, 46 La. Ann. 178; 15 So. 400. Widow and children's claim may be presented in a single suit. Clairain v. Western Un. Tel. Co., 40 La. Ann. 178; 3 So. 625. $1,500, awarded widow with four children in Boden v. Demwolf (U. S. D. C. E. D. La.), 56 Fed. 846.

[53] Huberwald v. Orleans R. Co., 50 La. Ann. 477; 23 So. 474. Children entitled to sue may however join with the widow in an action. Clairain v. Western Un. Tel. Co., 40 La. Ann. 178; 3 So. 625.

[54] Cheatham v. Red River Line (U. S. D. C. E. D. La.), 56 Fed. 248.

ferings, the reasonable expectation of benefit, the loss of support, etc., are considered elsewhere herein.[55]

§ 838. Damages sustained—Death of child.—The recovery for a child's death includes as elements of damages the loss of his services, and where his age and strength enabled him to contribute to their support, the loss thereof will be included. Compensation may also be had for the deprivation of his comfort to the parents as well as for his sufferings where he survived the accident a short time.[56] In determining the measure

[55] See secs. 828, 829, 831, 832, herein. Damages confined to loss sustained by children themselves in being deprived of their father. "The only facts which characterize the loss of the children who bring this suit are these: The children are respectively 6 months, 2½ and 5 years old. The father was aged 38 years, was earning the wages of a deck hand. He had been in the habit of devoting all his wages to the support of his children, to pay for their subsistence and rent per month, $16.59, besides providing for their clothes. In case of the damages resulting from the death of a person, the law of Louisiana contains no limit as to the amount of damages. This is true of the law of some other states. But in the law of many of the states, the amount is limited to the sum $5,000. The only act of congress which authorizes a recovery in case of death fixes the limit of damages at $5,000. The fact of this frequent limit has great weight with me, it is so purely problematic how long the most productive life will continue so." Cheatham v. Red River Line (U. S. D. C. E. D. La.), 56 Fed. 248, per Billings, Dist. J., case rev'd, Red River Line v. Cheatham (U. S. C. C. A. La.), 9 C. C. A. 124; 60 Fed. 517.

[56] Erslew v. New Orleans & N. E. R. Co., 49 La. Ann. 86; 21 So. 153. As to support, see sec. 831, herein. As to solatium, see sec. 830, herein. As to sufferings of deceased, see sec. 829, herein. As to general elements of damages, see sec. 828, herein. Deceased was 3½ years old —$12,500 reduced to $4,000. Rice v. Crescent City R. Co., 51 La. Ann. 108; 24 So. 791. In action by father his death after contradictory trial and before judgment abates suit as to heirs. Chivers v. Rogers, 50 La. Ann. —; 23 So. 100. That appeal court may assess nominal damages for death of child, see Hamilton v. Morgan's L. & T. R. & S. S. Co., 42 La. Ann. 824; 8 So. 586, noted in sec. 835, herein. As to exemplary damages for death of son, see McFee v. Vicksburg, S. & P. R. Co., 42 La. Ann. 790; 7 So. 729; Hamilton v. Morgan's L. & T. R. & S. S. Co., 42 La. Ann. 824, both noted under sec. 826, herein. Deceased was between 18 or 19 years old—$2,000 was awarded. Myhan v. Louisiana Elec. L. & P. Co., 41 La. Ann. 964; 6 So. 799; 7 L. R. A. 172; 17 Am. St. Rep. 436. Father may recover for injury to minor son which resulted in his death, occasioned by the negligence of railroad company's employees. Frank v. New Orleans & C. R. Co., 20 La. Ann. 25, under act of March 15, 1855.

of damages, however, for an infant's death, it seems that the question of instantaneous death is important.[57]

§ 839. Damages sustained—Collateral kindred.—The right of dependents to recover, expressly given by the Florida enactment, exists regardless of relationship in favor of either minors or adults and includes, therefore, collateral kindred. It would seem also that outside of the evidence of dependency requisite to bring those entitled within the class specified in the statute that much the same proof would be required as in other cases generally, such as age, etc,[58] although since the loss rests upon the deprivation of such support as arises from the nature of the relation of dependency, it evidently would be limited by the reasonable expectation of such benefit.[59]

§ 840. Damages sustained—Defenses—Mitigation of damages—Contributory negligence.—Imprudence or negligence of parents which is not of the character to defeat a recovery for the death of an infant is not proper evidence for the court or jury in mitigation of damages.[60]

§ 841. Damages sustained—Former marriage.—Where one claims to be the widow, proof of former marriage may be given when a proper foundation is laid therefor.[61]

[57] Hamilton v. Morgan's L. & T. R. & S. S. Co., 42 La. Ann. 824; 8 So. 586. See secs. 825, 827, herein.

[58] See sec. 828, herein.

[59] See Duval v. Hunt, 34 Fla. 85; 15 So. 876, upon all the above points. See sec. 831, herein.

[60] Rice v. Crescent City R. Co., 51 La. Ann. 108; 24 So. 791. See Westerfield v. Lewis (La. Ann.), 9 So. 52. As to sufficiency of complaint wherein absence of contributory negligence is averred, see Helm v. O'Rourke, 46 La. Ann. 178; 15 So. 400. See chapter herein as to negligence and contributory negligence.

[61] Albinest v. Yazoo & M. V. R. Co. (La. 1902), 31 So. 675.

CHAPTER XXXVI.

DEATH—GENERAL AND PARTICULAR STATUTES.

§ 842. "Cannot exceed"—"Shall not exceed"—No specific measure of damages—Statutes—Generally.
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§ 842. "Cannot exceed"—"Shall not exceed"—No specific measure of damages—Statutes—Generally.—The general law as to the recovery of damages for death in Indiana,[1] Kansas,[2]

[1] Horner's Rev. Stat. 1897, secs. 267, 284–286; Thornton's Rev. Stat. 1897, secs. 267, 284–286; Burns' Rev. Stat. 1894, secs. 267, 285; Rev. Stat. 1881, secs. 266, 282, 284; 2 Gav. & H. Ind. Rev. Stat. 1862, 330, sec. 784; Civ. Code, 1852, sec. 784, stat. 1876, p. 309. As to Employer's Liability, Act, see Burns' Rev. Stat. 1894, sec. 7085; Horner's Rev. Stat. 1897, sec. 5206t. As to abatement and survival, see Rev. Stat. 1894, sec. 272; Rev. Stat. 1896, sec. 282; 2 Gavin & Hurd's Rev. Stat. 1862, sec. 784; Pennsylvania R. Co. v. Davis (Ind. App.), 29 N. E. 425. Horner's Rev. Stat. sec. 282, is re-enactment with addition of the words "malicious prosecution" of Ind. Code, Civ. Proc. sec. 782, and is and was construed to hold that cause of action for injury to the person died with the person. Hilliker v. Citizens St. R. Co., 152 Ind. 86; 52 N. E. 607; 1 Repr. 529.

[2] Dassler's Gen. Stat. 1899, p. 948, sec. 4686 (421), p. 949, sec. 4687 (422a); Civ. Code, sec. 422; Kan. Laws, 1889, ch. 131; Kan. Gen. Stat. 1889, pars. 4518, 4519; Comp. Laws, 1879, sec. 422; Kan. Gen. Stat. 1868, ch. 80, sec. 422, p. 709. The first Kansas statute was passed in 1868 and is sec. 4518,

Minnesota[3] and Oklahoma,[4] provides that the damages "cannot exceed" a certain named sum.[5] So in New Hampshire[6] and Oregon,[7] the words used are, "shall not exceed" a sum specified.[8]

Gen. Stat. 1889; Western Un. Tel. Co. v. McGill (U. S. C. C. A. 8th C. Dist. Kan.), 57 Fed. 669, 701. Right of action, etc., for death, etc. Comp. Laws, 1885, ch. 80, secs. 420, 422, am'd 1889, ch. 131; Civ. Code, secs. 418, 420, 422, 422a (secs. 420, 422, construed in Martin v. Missouri Pac. Ry. Co., 58 Kan. 475; 3 Am. Neg. Rep. 165; 49 Pac. 605; 7 Am. & Eng. R. Cas. N. S. 576); Gen. Stat. 1868, ch. 80, sec. 422, p. 709. See Gen. Stat. 1889, sec. 4516; 1 Gen. Stat. 1889, par. 1251; Laws, 1874, ch. 93, sec. 1. As to injuries, etc., to railroad employees. Gen. Stat. 1889, secs. 4516, 4518, 4519. Civ. Code, secs. 420, 421, provide that, in addition to cases which survive at common law, an action for injury to the person survives, and pending actions shall not abate by death of either party, except certain actions specified, so that an action for loss, etc., from personal injuries caused by negligence, does not abate by plaintiff's death. Missouri Pac. R. Co. v. Bennett, 5 Kan. App. 231; 47 Pac. 183; 14 Natl. Corp. Rep. 6, aff'd 49 Pac. 606; 7 Am. & Eng. R. Cas. N. S. 534. But an administrator must be appointed before action can be revived in the administrator's name. Rexrord v. Johnson, 4 Kan. App. 333; 45 Pac. 1008. See also Walker v. O'Connell, 59 Kan. 306; 52 Pac. 894. Only the personal representative can sue under Kan. Comp. Laws, sec. 422; Hurlburt v. Topeka (U. S. C. C. E. D. Kan.), 34 Fed. 510.

[3] Gen. Stat. 1894, secs. 5912, 5913; Gen. Laws, 1891, ch. 123, secs. 1 (2, 3); Biss. Stat. 1873, sec. 25, p. 913; Rev. Stat. 1866, ch. 77, sec. 2, p. 546. As to injuries, etc., to employees, see Laws, 1887, ch. 13. As to abatement and survival, see Gen. Stat. 1878, ch. 66, sec. 41; Gen. Stat. 1894, sec. 5912. The first part of this section applies to all rights of action whether founded on contract or tort, and where a street railroad passenger received an injury causing death, it was held that his personal representative could not sue on the breach of contract for safe carriage for damages, counting on the expense and loss of time caused decedent between the time of his injury and death, unless the action was brought within the provisions of sec. 5913 of said act of 1894. Webber v. St. Paul City Ry. Co. (U. S. C. C. A. Minn. 1899), 97 Fed. 140.

[4] Stats. 1893, p. 832 (Civ. Proc. sec. 435), pp. 832–834, secs. 4311, 4312, 4314, 4315; (Civ. Proc. secs. 433, 434, 436, 437); Stat. 1890, ch. 70, art. 4 (par. 4336), par. 4338.

[5] In Indiana, Kansas and Oklahoma, $10,000, and in Minnesota, $5,000. See Stewart v. Terre Haute R. Co., 103 Ind. 44; 1 West. 153; 2 N. E. 208. See sec. 895, herein.

[6] Pub. Gen. Stat. 1901, p. 712, ch. 222, sec. 10 (See p. 750, ch. 239, sec. 32.); id. p. 629, ch. 191, secs. 8–13; Acts, 1893, 67, 5; Pub. Stat. 1891, ch. 191, secs. 8–13; Laws, 1887, ch. 71; Gen. Stat. 1867, ch. 264, sec. 14, p. 529.

[7] Hill's Annot. Laws, p. 158, sec. 34, p. 401, secs. 369–371; Hill's Code, secs. 34, 369–371; Comp. Law, 1887, sec. 371; Gen. Laws, 1872, p. 187; Code, 1862, p. 97, sec. 367.

[8] In New Hampshire, $7,000, and

But in none of those states is there any other specific provision as to the measure of damages under the said general law as to recovery for negligent, etc., death. In Iowa,[9] however, there is no specific limitation of damages or provision for the admeasurement thereof.

§ 843. Statutes of same states—Continued—Railroads and mines.—In Indiana, there is also a statute relating to railroads and a recovery for injury caused thereby, which provides that "the damages recoverable under this act shall be commensurate with the injury sustained, unless death results from such injury, when, in such case, the action shall survive and be governed in all respects by the law now in force as to such actions."[10] Still another statute relates to coal mines and the recovery of damages for the death of a person caused by the violation of any of its provisions.[11]

§ 844. Statutes of same states—Continued—General pro-

in Oregon, $5,000. See sec. 895, herein.

[9] Code, 1897, secs. 3443-3445, 3447, subd. 3, sec. 3471; Code, 1888, secs. 2525-2527; McClain's Annot. Code, secs. 3730-3732, 3734, subd. 1, sec. 3861; Code, 1873, secs. 2525, 2526; Code, 1873, sec. 1307. Under sec. 1307 of the Code, relating to liability of railway corporations, recovery may be had for death of car inspector killed by cars while at work. Canon v. Chicago, M. & St. P. Ry. Co., 101 Iowa, 613; 70 N. W. 755; 2 Am. Neg. Rep. 131; 9 Am. & Eng. R. Cas. N. S. 12. As to survival of action for injuries to the person, see McClain's Ann. Code, 1888, sec. 3730; Miller's Rev. Code, 1888, sec. 2525, p. 866; Iowa Code, 1873, secs. 2525, 2526, provided for survival, notwithstanding death, and that the right to a civil remedy was not merged in a public offense but could be enforced independently of, and in addition to punishment also for the disposition of the assets or damages and nonliability to creditors.

[10] Rev. Stat. secs. 7083, 7085; Horner's Rev. Stat. 1897, sec. 5206t; Cowen v. Ray (U. S. C. C. A. 7th C. Dist. Ind.), 108 Fed. 320; Hunt v. Connor (Ind. App. 1901), 59 N. E. 50. See citations of statutes, sec. 841, herein.

[11] Act, March 2, 1891 (Acts, 1891, p. 57; Burns' Rev. Stat. 1894, sec. 7461 et seq.), sec. 13; Maule Coal Co. of P. v. Partenheimer (Ind. 1899), 55 N. E. 751, holding that the administrator of a deceased employee cannot recover for his death caused by explosion of gas in the mine. Boyd v. Brazil Block Coal Co., 22 Ind. App.; 50 N. E. 368, holding also that the right of action is limited to the persons expressly named and does not include personal representatives. See citations of statutes, sec. 842, herein.

visions.—In Indiana, Iowa and Oregon,[12] the father, or under certain circumstances, the mother, or the guardian, may sue for the death of a child. In other cases in Indiana and Oregon, the personal representative, and in Iowa, the legal representative, is entitled to bring suit, and in Kansas, Minnesota and Oklahoma, the personal representative may sue, but in all these states, except Iowa, action can only be brought if the deceased could have maintained an action had he lived. Again, in Kansas, in certain cases of nonresidents or death in another jurisdiction, the action may be brought by the widow, or next of kin where there is no widow.[13] In Indiana, Kansas, Minnesota, Oklahoma and Oregon, the recovery is for death caused by wrongful act or omission.[14] In Iowa, the cause of action survives, nor is the

[12] See statutes cited, sec. 842, herein.

[13] See statutes cited, sec. 842, herein. As to wrongful act or omission, see Louisville E. & St. L. R. Co. v. Clarke, 152 U. S. 220; 14 Sup. Ct. Rep. 578; 38 L. Ed. 422; Evansville, etc., R. Co. v. Lowdermilk, 15 Ind. 120; Donaldson v. Mississippi, etc., R. Co., 18 Iowa, 280 (under Rev. Stat. sec. 4111), holding also that the action is not confined to criminal acts. That personal representative may sue, although a year and a day has passed after the injury, see Louisville, E. & St. L. R. Co. v. Clarke, 152 U. S. 230; 38 L. Ed. 422; 14 Sup. Ct. Rep. 579. The complaint must show that deceased left a wife and children or next of kin, under Ind. Rev. Stat. 1894, sec. 285. State v. Merriweather (Ind. App.), 39 N. E. 162. See also Stewart v. Terre Haute & I. R. Co., 103 Ind. 44; 1 West. 152 note; 2 N. E. 208; Commercial Club v. Hilliker, 20 Ind. App. 239; 50 N. E. 578. That administrator of Missouri, under 1 Rev. Stat. Mo. 1879, secs. 2121 and 96, has no standing in Federal court in Kansas, under Laws, Kan. 1679, sec. 422, see Hurlburt v. Topeka (U. S. C. C. D. Kan.), 34 Fed. 510, holding also, that the right of the personal representative is exclusive, under sec. 422. See also Eureka v. Merrifield (Kan.), 37 Pac. 113; Martin v. Northern P. Ben. Assoc., 68 Minn. 521; 71 N. W. 791. When a class of persons is specified, as comprising those for whose exclusive benefit damages are recoverable, no damages to any other person, or class of persons, can be allowed in an action based upon the statute. If no such person, or class of persons, exist as those specified in the statute, no action can be maintained, and in order to maintain the action, the existence of the beneficiary and the pecuniary loss must be alleged and proved. Western Un. Teleg. Co. v. McGill (U. S. C. C. A. 8th C. Dist. Kan.), 57 Fed. 699, 701, per Sanborn, Cir. J.

[14] See statutes cited, sec. 842, herein. See sec. 852, herein. It must appear from the complaint that the death resulted from the negligent acts charged. Louisville, A. & C. R. Co. v. Thompson (Ind.), 5 West. 833. The statute creates a new and independent right of action. Pittsburgh, C. C. & St. L. R. Co. v. Hosea, 152 Ind. 412; 1 Repr. 896; 53

civil remedy merged in the public offense. The cause of action also survives in Indiana, Oklahoma, and Oregon, and in New Hampshire it survives, subject to certain limitations.[15] In all the states last named except Oregon, the damages recovered must inure to the exclusive benefit of the widow, or children if any, or next of kin, to be distributed in the same manner as personal property of the deceased. The Minnesota statute, however, uses the words, "to be distributed to them in the same proportion as the personal property of deceased persons," after demands for support of deceased, and funeral expenses have been deducted and paid, while in Oregon the amount recovered, if any, shall be administered as other personal property of the deceased. In New Hampshire, the damages, less the expenses of recovery, are distributed in certain specified proportions to the widow, or widower, child or children, as the case may be. Again, the time limit for commencing the action is two years in all the states named under this section.[16]

§ 845. Statutes and constitutions—Particular statutes.—The legislative enactments, in the states mentioned in the ap-

N. E. 419; 14 Am. & Eng. R. Cas. N. S. 692, dis'g Hecht v. Ohio & M. R. Co., 132 Ind. 507. Does not create a new cause of action or impose any limitation on any existing one, but simply changes the remedy. Atchison, T. & S. F. R. Co. v. Napole, 55 Kan. 401; 40 Pac. 669. As to the right being independent, see Putnam v. Southern Pac. Co., 21 Or. 230; 27 Pac. 1033; 44 Alb. L. J. 517; 10 Ry. & Corp. L. J. 490. Action is not new but a survival action. Lyon v. Boston & M. R. Co. (U. S. C. C. D. Vt.), 107 Fed. 386, under Pub. Stat. N. H. 1901, ch. 191, secs. 8–12.

[15] See statutes cited, sec. 842, herein. Under the Employer's Liability Act, Burns' Rev. Stat. 1894, sec. 7085; Horner's Rev. Stat. 1897, sec. 5206t, the action survives. Hunt v. Connor (Ind. App. 1901), 59 N. E. 50. Action abates upon death of wrongdoer, under Rev. Stat. 1881, sec. 284; Hamilton v. Jones, 125 Ind. 176; 25 N. E. 192. See further as to survival, Martin v. Missouri P. R. Co., 58 Kan. 475; 49 Pac. 605; 7 Am. & Eng. R. Cas. N. S. 576; Missouri P. R. Co. v. Bennett, 5 Kan. App. 231; 47 Pac. 183; 14 Nat. Corp. R. 6, aff'd 49 Pac. 606; 7 Am. & Eng. R. Cas. N. S. 534; Atchison, T. & S. F. R. Co. v. Chance, 57 Kan. 40; 45 Pac. 60; 4 Am. & Eng. R. Cas. N. S. 238; Atchison, T. & S. F. R. Co. v. Rowe, 56 Kan. 411; 43 Pac. 683; Webber v. St. Paul City Ry. Co. (U. S. C. C. A. Minn.), 97 Fed. 140, under Gen. Stat. Minn. 1894, secs. 5912, 5913; Lyon v. Boston & M. R. Co. (U. S. C. C. D. Vt.), 107 Fed. 386, under Pub. Stat. N. H. 1901, ch. 191, sec. 8.

[16] See statutes cited, sec. 842, herein.

pended note and considered under this chapter, contain certain provisions not common with those of other jurisdictions.[17]

[17] *Connecticut.* Gen. Stat. 1888, secs. 1007–1009; Gen. Stat. 1875, sec. 9, p. 422, sec. 3, p. 488; Rev. 1866, p. 196, sec. 513, p. 202, ch. 7, sec. 544, p. 22, sec. 98; Acts, 1853, ch. 74, sec. 8, Acts, 1848, ch. 5; Stats. 1888, sec. 1383; limits the period of commencement of action against railroad companies; sec. 1005 provides for prosecution of suit on death of plaintiff (See as to laches in procuring administration and prosecuting under this section, Johnson v. N. Y. & N. E. R. Co. [Conn.], 14 Atl. 773). As to survival of action for personal injuries, see Gen. Stats. 1888, secs. 1007–1009. The Acts, 1848, ch. 5, secs. 1, 2, provided that "no cause of action for injury to the person . . . shall abate by reason of his death" etc. Acts, 1853, ch. 74, sec. 8, related to actions for death caused by railroad corporations. These statutes were brought together in the General Statutes of 1888. Budd v. Meriden Elec. Rd. Co., 69 Conn. 272; 37 Atl. 683; 3 Am. Neg. Rep. 335, 341, per Andrews, C. J.; Rev. Stat. 1866, ch. 7, sec. 544, p. 22, sec. 98; Gen. Stats. 1875, p. 422, sec. 9, p. 488, sec. 3.

Dakota—North Dakota and South Dakota. Dak. Comp. Laws, secs. 5498, 5499 Const. N. D., sec. 2; Rev. Codes; N. D. 1899 (Code Civ. Proc.), secs. 5234, 5974–5979; N. D. Code, 1895, sec. 5974. As to survival, see Rev. Code, sec. 5234; S. D. Laws, 1891, ch. 4; Comp. L. 1887, secs. 5498, 5499.

District of Columbia. Abert & Lovejoy's Comp. Stat. 1894, pp. 397, 398, ch. 49, secs. 1–3 (Acts of Congress, Feb. 17, 1885; 23 Stat. 307, ch. 126, sec. 1); (Laws of Del. 1901, p. 500, ch. 21, C.—Approved March 9, 1901) (Md. Act, 1785, ch. 80, sec. 1). As to Act, Cong. Feb. 17, 1885, in connection with Maryland act of 1798, in regard to the party entitled to letters of administration, see Ferguson v. Washington & G. R. Co. (D. C. App.), 23 Wash. L. Rep. 407. The provisions of Act of 1785, ch. 80, sec. 1, regarding abatement of an action within a specified time after death where no representative is brought in, are not applicable where there are two or more parties plaintiff, one of whom survives. Corbett v. Pond, 10 App. D. C. 17; 25 Wash. L. Rep. 33. Creditors' bill by several creditors is not abated by death of one of them. Young v. Kelly (D. C. App.), 22 Wash. L. Rep. 313. Death of parties does not abate, etc. Abert & Lovejoy's Comp. Stat. D. C. 1894, p. 457, sec. 81. See also id. p. 101, sec. 85, p. 459, sec. 82, p. 460, sec. 84, p. 290, sec. 15.

Georgia. 2 Ga. Code (Civ.) 1895, secs. 3825, 3828, 3829, 3830, 3864–3866; Act, Oct. 27, 1887; Code, 1887, sec. 588; Code, 1882, secs. 2967–2871. Am'd Laws, 1889, No. 735, p. 73, sec. 2971; Am'd Laws, 1887, No. 588, p. 43; Code, 1882, secs. 2970, 2972, 3003–3005. See as to injuries, etc., to railroad employees, Code, 1882, secs. 2202–3036, and Act, 1855.

Kentucky. Const. 1891, sec. 241; Carroll's Stat. 1899, p. 179, sec. 4, p. 180, sec. 6 (Act, July 3, 1893, Ky. Stats. ch. 1); (See id. sec. 10, as to survival actions.); id. p. 958, sec. 2516; Stat. 1894 (Gen. Stat. ch. 1, sec. 6; id. ch. 57, secs. 1, 3; id. ch. 32, secs. 1, 2; id. ch. 71, art. 3, sec. 3); Ky. Gen. Stat. ch. 30, art. 1, sec. 11. No common-law action survived to the personal representative of deceased. The

§ 846. Statutory provisions as to measure of compensation.[18]—In Connecticut, "just damages" may be recovered for

only law under which an action for loss of life could be maintained, existed under Const. sec. 241, and secs. 1, 3, ch. 57, of the Gen. Stats. (See Louisville & Nashville R. Co. v. Kelly, 100 Ky. 421; 19 Ky. L. Rep. 78; 40 S. W. 452; 1 Am. Neg. Rep. 249, denying rehearing of 19 Ky. L. Rep. 69; 38 S. W. 852; 7 Am. & Eng. R. Cas. N. S. 165.) Cause of action under Const. sec. 241, cannot be joined with common-law cause of action for physical suffering of intestate between injury and death. Owensboro & N. R. Co. v. Barclay, 19 Ky. L. Rep. 997; 43 S. W. 177. That action brought by executor cannot be revived in name of his executor, and as to non-revival within a year under Gen. Stat. chap. 30, art. 1, sec. 11 and Ky. Civ. Code, sec. 509, see Bardstown & G. R. Turnp. R. Co. v. Howell, 13 Ky. L. Rep. 563; 17 S. W. 481. Action may be revived without delay where one of the plaintiffs dies, upon suggestion of the death, petition in representative's name as party, and letters of administration. Rains v. Lee, 18 Ky. L. Rep. 285; 36 S. W. 176. As to negligent act in driving over another, and survival, see Perkins v. Stein, 15 Ky. L. Rep. 203; 22 S. W. 649. As to survival of action for injury to the person, see also Stats. 1894, sec. 10; Gen. Stat. 1887, ch. 10, sec. 1. As to distribution of damages as personal estate under Const. sec. 241; Gen. Stat. ch. 31, secs. 1, 11, see Berg v. Berg, 20 Ky. L. Rep. 1083; 48 S. W. 432.

Massachusetts. Statutes as to railroads and other common carriers, etc. Stat. 1886, ch. 140 (See 1896, 578, sec. 11; 1896, 302; 1895, 362; 1894, 499; 1889, 154.); Pub. Stat. 1882, ch. 112, secs. 212, 213 (affected 1894, 67); Stat. 1883, ch. 243 (affected 1897, 491; 1896, 302; 1895, 362, sec. 7; 1894, 499; 1893, 359; 1892, 260; 1888, 155; 1887, 270); Pub. Stat. 1882, ch. 73; id. ch. 52. Statute as to defective highways, etc. Pub. Stat. 1882, ch. 52. Employer's Liability Act, Stat. 1887, ch. 270, secs. 1–3 (am'd 1888, ch. 155; 1892, 260, sec. 1; 1894, 499 [Supp. to Mass. Pub. Stat. pp. 582, 583] am'd 1895, 362, sec. 7 [id. pp. 746, 747, 1163. See also id. p. 1076*]. See 1890, 83; 1895, 362, sec. 7; construed, 1897, 491. See 1890, 83, 181; 1894, 389; 1895, 362, sec. 7. As to sec. 3 of ch. 270, Stat. 1887, see Amd't 1888, 155; 1892, 260, sec. 2; 1900, 446). As to survival, see Pub. Stat. 1882, p. 958, sec. 1; id. ch. 165, sec. 1, ch. 166, sec. 1; Wilkins v. Wainwright, 173 Mass. 212; 53 N. E. 397.

Mississippi. Const. 1890, sec. 193; Thompson, Dillard & Campbell's Code, 1892, sec. 663 (1510). Rev. Code, 1851, p. 486, sec. 48; Const. 1890, sec. 193, gives legal and personal representatives of railroad employee, killed through negligence of fellow servants in another department, same remedies as are allowed by law to such representatives or persons not employees. See also Ann. Code, 1892, sec. 3559. As to right of action, etc., upon death, etc., see Code, 1892, sec. 663; Rev. Code, 1851, sec. 48, p. 486. Under Code, secs. 2078, 2079, personal representatives have the right to prosecute any personal action which intestate might have prosecuted. See Illinois C. R. Co. v. Pendergrass, 69 Miss.

[18] See sec. 845, herein, for citations of statutes of states noted in text.

the injuries resulting in death from negligence. In the District of Columbia, the provision is "for damages for such death," to

425; 12 So. 954; 47 Alb. L. J. 495; Beckman v. Georgia P. R. Co. (Miss.), 12 So. 956. As to survival of personal injury actions, see Code, secs. 1513, 2078, 2079.

Nevada. Comp. Laws, 1900, secs. 3983, 3984 (Civ. Proc. Act) approved Feb. 28, 1871, 90; Laws, 1885, secs. 3898–3899. As to abatement, see Gen. Stat. 1885, sec. 3038.

New Hampshire. Pub. Stat. 1501, ch. 191, p. 629, secs. 8–13; Amd't 1893, 67, 5; id. p. 712, ch. 222, sec. 10; id. p. 750, ch. 239, sec. 32; Pub. Stat. 1891, ch. 191, secs. 8–14; Laws, 1887, ch. 71, Gen. Stat. 1867, ch. 264, sec. 14, p. 529, as to employee.

New Mexico. Comp. Laws, 1897, p. 810, secs. 3213–3215; id. p. 811, secs. 3216–3217; id. p. 812, sec. 3218; Comp. Laws, 1884–1885, secs. 2308–2310, 2316; Am'd Laws, 1891, ch. 49. As to injuries to employees, see Laws, 1893, ch. 28. As to survival of actions, see Comp. Laws, 1884, sec. 2139.

North Dakota. See Dakota above.

Ohio. Bates' Annot. Ohio, Stat. 1902, pp. 3076, 3078, secs. 6134, 6135; Rev. Stat. 1894, secs. 6134, 6135; Act April 13, 1880; Swan & Cr. Rev. Stat. 1860, p. 1139, ch. 87, secs. 636, 637; Stat. March 25, 1851. As to liability of railroad companies for injury to employee, see Act, April 2, 1890 (Laws, 1890, p. 149), as Am'd Act, April 13, 1880. As to survival of action, see Rev. Stat. sec. 5144 (1 Rev. Stat. 1890, p. 1491). A right to revive an action for personal injuries under sec. 5144, is a right inhering in the action, where plaintiff dies pending suit, although the right to sue would have abated if suit had not been brought, and this right of revival accompanies the action on removal into the Federal court. Baltimore & O. R. Co. v. Joy, 173 U. S. 226; 19 Sup. Ct. 387; 43 L. Ed. 677; 5 Am. Neg. Rep. 760. As to Rev. Stat. sec. 5149, providing for continuance of an action by or against a personal representative, in case of death or disability of a party, and its construction in connection with Rev. Stat. sec. 5159, see Eagle Paper Co. v. Bragg (Cin. Super. Ct.), 4 Ohio Dec. 94. See also 2 Bates' Ann. Stat. 1897, sec. 4975.

Rhode Island. Gen. Laws, 1896, p. 807, ch. 233, secs. 14, 15; Pub. Stat. 1882, ch. 204, secs. 15–20; id. ch. 205, sec. 3; Gen. Stat. 1875, p. 444, ch. 176, sec. 16; Rev. Stat. 1857, ch. 176. As to revival, see Gen. Laws, 1896, p. 806, ch. 233, sec. 7; Pub. Stat. ch. 189, secs. 5, 6. Death of employee on steamboat, through fellow servant's negligence, is not within Pub. Stat. ch. 204, sec. 15. Miller v. Coffin, 19 R. I. —; Index. R. R. 1. Rev. Stat. 1857, ch. 176, creates right of action for death, and provides for survival of actions of trespass on the case for damages to the person, but the survival does not apply to cases of injuries causing death. Lubrano v. Atlantic Mills (R. I.), 32 Atl. 205. Under Gen. Laws, ch. 218, sec. 5, providing that if cause of action survives and party dies before entry of final judgment, his administrator may prosecute or defend to final judgment, and under ch. 233, sec. 7, cl. 3, providing for survival of such causes of action, the plaintiff's death, in trespass for damage to the person, after decision rendered and before entry of judgment does not abate the action. Hambly v. Hayden, 20 R. I. 558; 40 Atl. 417.

South Dakota. See Dakota above.

be "assessed with reference to the injury resulting from such act, neglect, or default, causing such death." In Georgia, "the full value of the life of the deceased, as shown by the evidence," may be recovered, "without deduction for necessary or other personal expenses of the deceased had he lived." In Kentucky, under the constitution, "damages may be recovered for such death," and in that state, under the earlier statute, damages were recoverable "for the loss or destruction of the life."[19] There is also, in the same state, an action given "for reparation of the injury," to a wife or minor child of a person killed in a duel. In Mississippi, the "jury may give such damages as shall be fair and just, with reference to the injury resulting from such death." In Nevada, the "jury may give such damages, pecuniary and exemplary, as they shall deem fair and just, and may take into consideration the pecuniary injury resulting from such death." In New Mexico, the jury may give "such damages, compensatory and exemplary, as they shall deem fair and just, taking into consideration the pecuniary injury, or injuries resulting from such death." Under the act, however, relating to common carriers and defective highways, etc., the person liable "shall forfeit and pay for every person or passenger so dying," the sum specified. In North Dakota, under the 1899 statute, the "jury shall give such damages as they think proportionate to the injury resulting from the death," while in North Dakota, South Dakota (under the General Statute of Dakota), and Dakota, damages may be recovered "for the loss, or destruction of the life." In Ohio, the "jury may give such damages" "as they may think proportioned to the pecuniary injury resulting from such death." In Tennessee,

Tennessee. Shannon's Annot. Code, 1896, p. 986, secs. 4025 (2291), 3130, 4026 (2292), 3131, 4027, 3132, 4028 (2293), 3133, 4029, 3134; id. p. 1111, sec. 4469 (2772), 3469; Mill & V. Code, secs. 3130–3134, 3469. As to survival, see Shannon's Code, 1896, sec. 4568, p. 1134. See also id. secs. 4569 et seq.; Act, 1851, ch. 17; Am'd Act, 1871, ch. 78.

Washington. Ballinger's Codes and Stats. 1897, secs. 4828, 4829; Hill's Ann. Stats. and Codes, 1891, secs. 138. 139, 703; Code, 1881, secs. 8, 9, 717. As to survival to wife or child, see Ballinger's Codes and Stats. 1897, sec. 4838.

New Brunswick. Consol. Stat. ch. 86.

Quebec. Civ. Code, L. Can. art. 1056.

[19] Gen. Stat. ch. 57, sec. 3. See sec. 857, herein.

the damages resulting to those entitled are recoverable, as well as certain damages to deceased from the personal injuries. In Washington, the "jury may give such damages, pecuniary or exemplary, as under all circumstances of the case may seem to them just." In New Brunswick, the "jury may give such damages, by way of fair compensation, as they may think proportioned to the pecuniary loss resulting from such death." In Quebec, the recovery is for "all damages occasioned by such death."

§ 847. Statutory matters of aggravation, mitigation or defense—Notice and particulars of injury or loss.[20]—In Connecticut the statutory notice is not a pleading, and its sufficiency is tested with reference to the purpose for which it is required.[21] In Massachusetts for death from negligence of a railroad, street railway, steamboat company, or other common carrier, or defective highway, etc., the degree of culpability is considered; so also under the "Employer's Liability Act." And, under this latter act, notice of the injury must be given.[22] In New Mexico the jury may regard mitigating or aggravating circumstances attending such death, and the appellant may show in defense that the defect or insufficiency in the railroad, etc., was not negligence. In New Brunswick a bill of particulars of persons, and of the manner of the pecuniary loss to different persons must be given.

§ 848. Statutory right to damages—Common carriers—Defective highways—Employer's Liability Act.[23]—In Connecticut, the present statute is not limited to injuries inflicted by a railroad company,[24] but includes all injuries resulting in

[20] See sec. 845, herein for citations of statutes of states noted in text.

[21] Budd v. Meriden Elec. R. Co., 69 Conn. 272; 37 Atl. 683; 3 Am. Neg. Rep. 335, 342, per Andrews, Ch. J., citing several cases and cited in Breen v. Cornwall (Conn. 1900), 47 Atl. 322, and see notes as to notice, 9 Am. Neg. Rep. 33; 7 Am. Neg. Rep. 706.

[22] As to notice under Stat. 1887, ch. 270, secs. 1, 3, see Gustafsen v. Washburn & M. Mfg., 153 Mass. 468, and as to notice under same statute as amended, Mass. Stat. 188, ch. 155, see Jones v. Boston & A. R. Co., 157 Mass. 51; 31 N. E. 727; Daly v. New Jersey S. & I. Co., 155 Mass. 1.

[23] See sec. 845, herein, for citations of statutes of states noted in the text.

[24] As in case of acts of 1853, ch. 74, sec. 8.

death.[25] In Massachusetts, the statute provides for recovery for death caused by negligence, or carelessness of railroad or street railway corporations, for the death of an employee of the railroad, or for the loss of life of passengers, by the negligence or carelessness of steamboat, or stage coach proprietors, or other common carriers, and for loss of life from defective highways, or bridges.[26] In Kentucky, there is also a general statutory provision for the recovery of damages resulting from "the negligence or carelessness of the proprietor," etc., of agents, etc., of railroad companies, and damages may be recovered "in the same manner that the person himself might have done for any injury where death did not ensue."[27] In New Mexico, the statute provides for recovery for death caused from injury occasioned by negligence, unskillfulness, or criminal intent of any officer, agent, etc., of a railroad company, stage coach, or public conveyance, or when occasioned by any defect or insufficiency in any railroad, etc. In North Dakota, South Dakota, and Da-

[25] Budd v. Meridan Elec. R. Co., 69 Conn. 272; 37 Atl. 683; 3 Am. Neg. Rep. 335, 341, per Andrews, Ch. J.

[26] Mass. Pub. Stat., 1882, ch. 112, sec. 212, specially provides for actions against railroads as common carriers, when death results to passengers or employees. Sec. 6, ch. 73, relates to actions against common carriers in general for death of passengers. "The counsel assume that the action was finally rested on Pub. Stat. ch. 73, sec. 6. Pub. Stat. ch. 73, sec. 6, as well as chap. 112, sec. 212, is a re-enactment from chap. 199, of the acts of 1881. Both in the acts of 1881 and in the Public Statutes, special provision is made for railroad corporations. Therefore, by plain rules of construction, they are not included in the general language of chap. 73, and that should be interpreted as though it read, 'common carriers, other than those especially provided for.' This is clearly the proper construction; and apparently it was so held in Holland v. Railroad Co., 144 Mass. 425, 427, 429; 11 N. E. 674." Boston & M. R. R. Co. v. Hurd (U. S. C. C. A. 1 St. Cir. Dist. N. H.), 47 C. C. A. 615; 108 Fed. 116, 123, per Putnam, J. In Minnesota, the measure of damages against an employer is controlled by the law of the place, and where the contract of employment was made, even though death was occasioned in another state, where suit was brought. Northern Pac. R. Co. v. Babcock (Minn.), 154 U. S. 190; 38 L. Ed. 958; 14 Sup. Ct. 978.

[27] Chap. 57, sec. 1, gives no right to recover damages to the administrator of an employee of a railroad Company. Cincinnati, N. O. & T. P. R. Co. v. Adams, 11 Ky. L. Rep. 833; 13 S. W. 428. And the degree of negligence determines whether the action is brought under chap. 57, sec. 1, or under sec. 3. Givens v. Kentucky C. R. Co., 11 Ky. L. Rep. 452; 12 S. W. 257. See Morris v. Louisville & N. R. Co., 11 Ky. L. Rep. 698; 12 S. W. 940.

kota, the action lies for the death of any person, not an employee of a railroad corporation when occasioned by negligence or carelessness of railroad companies, etc.[28] In Washington, action lies for death occasioned by injury from defective sidewalks, etc. And in Massachusetts, a recovery may be had under the Employer's Liability Act, in certain cases of death of an employee occasioned through an employer's negligence, etc.[29]

§ 849. Statutory right to maintain action for damages.[30]— In Mississippi, Nebraska, Nevada, New Mexico, North Dakota, Ohio, Rhode Island and New Brunswick, an action lies whenever death is caused by wrongful act, neglect or default, such as would, if death had not ensued, have entitled the party injured to maintain an action, and recover damages in respect thereof.[31] In other jurisdictions there are similar provisions. Thus in the District of Columbia, the recovery is for death caused by the "wrongful act, neglect or default," where such neglect, etc., "is such as would, if death had not ensued have entitled the party injured," or in case of a married woman, her husband separately or jointly with her to have maintained an action. In Massachusetts, if an employee of a railroad or street railway is killed, under such circumstances as would have entitled the deceased to have maintained an action for damages if death had not resulted, the corporation is liable the same as if deceased had not been an employee. In Washington, under the Code of 1891, the action lay when death was caused "by the wrongful act or omission of another," if the deceased might have maintained an action, had he lived, for an injury caused by the same act or omission. In other states the provisions differ somewhat. Thus in Georgia the right to sue is given for

[28] So under Dakota Laws, 1887.

[29] See chapter 37, herein, as to instantaneous death. Under Burns' Rev. Stat. 1894, sec. 7473, as to mines, the personal representative of the person killed cannot sue. Boyd v. Brazil Block-Coal Co. (Ind. App. 1900), 57 N. E. 732, denying rehearing, 50 N. E. 368.

[30] See sec. 844, herein, for citations of statutes of states noted in text.

[31] In Mississippi, these words follow "and such deceased person shall have left a widow, or children, or both, or husband or father, or mother," etc. In North and South Dakota (Dakota) under the Dakota Statute, the words used were, "If the life of any person or persons is lost or destroyed by the neglect, carelessness or unskillfulness, of another."

"homicide," which includes "all cases where the death of a human being results from a crime, or from criminal or other negligence."[32] In Kentucky, the constitution and the statute of 1899 gives an action for damages when death "shall result from an injury inflicted by negligence or wrongful act." There is also a general provision in that state, for recovery where the "life of any person or persons is lost or destroyed by the wilful neglect of any person," etc. Another special provision is that the widow and minor child, either or both, of a person killed by the careless, wanton or malicious use of certain specified deadly weapons, not in self-defense, may have an action against the person committing the killing and those aiding and abetting him.[33] Again, an action for damages lies in this state, and in Quebec, for killing in a duel. In Quebec, recovery may also be had for death from injury, by the commission of offenses, or quasi offenses, where indemnity or satisfaction has not been obtained. In the District of Columbia, Nevada, New Mexico, under the North Dakota act of 1899, and Rhode Island, damages may be recovered, although the death shall have been caused under such circumstances as amount in law, to or constitute a felony. While in Ohio, the damages are recoverable, "although the death shall have been caused under such circumstances, as amount in law to murder in the first or second degree, or manslaughter." Nor in Rhode Island is it necessary to first institute criminal proceedings.

§ 850. Statutory right to damages—Who entitled.[34]—In

[32] It is held that the law giving a right of action to the representative of a person killed in a railroad accident, in all cases where he could have sued had he survived, is constitutional and does not impair the obligation of contracts between the state and the railroad company. Southwestern R. Co. v. Paulk, 24 Ga. 356. See Chiles v. Drake, 2 Metc. (Ky.) 146.

[33] Inducing one of feeble mind to drink sufficient liquor to kill him gives an action for death by wilful neglect. Rogers v. Hughes, 87 Ky. 185; 10 Ky. L. Rep. 68; 8 S. W. 16. No action lies for death wilfully and intentionally inflicted. Winnegar v. Central Pass. R. Co., 85 Ky. 547; 4 S. W. 237. As to action under chap. 57, sec. 3, and wilful neglect causing death, see Louisville & N. R. Co. v. Coppage, 12 Ky. L. Rep. 200; 13 S. W. 1086; Kentucky C. R. Co. v. Wainwright (Ky.), 13 S. W. 438; Koenig v. Covington, 11 Ky. L. Rep. 25; 12 S. W. 128; Louisville & N. R. Co. v. Merriwether (Ky.), 12 S. W. 935.

[34] See sec. 845, herein, for cita-

Connecticut, the action survives to the executor or administrator, and the damages "inure to the benefit of the husband, or widow and heirs of the deceased person, after deducting the cost and expenses of suit," in the manner and to the persons specified.[35] In the District of Columbia, the persons entitled are the widow, and next of kin.[36] In Georgia, "A widow, or if no widow, a child or children may recover for the homicide of the husband, or parent," the husband may recover for the "homicide" of his wife, or if a child or children survive, the husband and children shall sue jointly, while "a mother, or if no mother, a father, may recover for the homicide of a child, minor or sui juris, upon whom she or he is dependent, or who contributes to his support, unless said child leave a wife, husband or child."[37] In Kentucky, the right to sue is in the "personal representative" under the constitution and act of 1893, statute of 1899,

tions of statutes of states noted in text.

[35] The right to sue is given to the executor or administrator, who may bring suit, without naming the heirs or averring that there are any, as the law presumes that there are heirs. Budd v. Meriden Elec. R. Co., 69 Conn. 272; 37 Atl. 683; 3 Am. Neg. Rep. 335, 342, per Andrews, Ch. J. (citing Pitkin v. N. Y. & N. E. R. Co., 64 Conn. 482; 30 Atl. 772; Warner v. Railroad Co., 94 N. C. 258; Railroad Co. v. Wightman's Admr., 29 Grat. [Va.] 441; Madden v. Railroad Co., 28 W. Va. 612). Suit may be brought by the administrator. Soule v. N. Y. & N. H. R. Co., 24 Conn. 575. Person operating railroad as trustee is liable. Lamphear v. Buckingham, 33 Conn. 237. As to beneficiaries, see Andrews v. Hartford & N. R. Co., 34 Conn. 57; Lamphear v. Buckingham, 33 Conn. 237.

[36] As to substituting personal representative in place of decedent, see Danenhower v. Ball, 8 App. D. C. 137; 24 Wash. L. Rep. 221.

[37] Unconditional right conferred on widow not affected by survival of injured person a year and a day. Western & A. R. Co. v. Bass, 104 Ga. 390; 30 S. E. 874; 11 Am. & Eng. R. Cas. N. S. 608, and cases cited. Railroad company may be liable for a killing by its agent of one visiting the office on business, where the latter was without fault, otherwise if there was provocation and justification. Columbus & R. R. Co. v. Christian, 97 Ga. 56; 25 S. E. 411. As to right of parents, see Richmond & D. R. Co. v. Johnston, 89 Ga. 560; Augusta Factory v. Davis, 87 Ga. 648. As to right of personal representatives, see Louisville & N. R. Co. v. Chaffin, 84 Ga. 519. As to beneficiaries generally, see Perry v. Georgia R. & B. Co., 85 Ga. 193; 11 S. E. 605; Clay v. Central R. & B. Co., 84 Ga. 345; 10 S. E. 967; Womack v. Central R. & B. Co., 80 Ga. 132; 5 S. E. 63; Scott v. Central R. Co., 77 Ga. 450; East Tenn. V. & G. R. Co. v. Maloy, 77 Ga. 237; Atlanta & W. P. R. Co. v. Venable, 65 Ga. 55; 67 Ga. 697; Allen v. Atlanta St. R. Co., 54 Ga. 508.

and also under the earlier railroad enactment. Under the earlier general provision, said right is in the "widow, heir, or personal representative," while "the widow and minor children" may recover under the acts relating to deadly weapons, and killing in a duel. In that state the benefit of the recovery inures, under the statute of 1899, to the widow or husband, parent or parents, child or children, in the order and amounts specified; or under certain circumstances to remote kindred after payment of the debts of the deceased.[38] In Massachusetts, under the

[38] When peace officer liable for killing although attempting arrest. Johnson v. Williams, 23 Ky. L. Rep. 658; 63 S. W. 759; 54 L. R. A. 220. Foreign administrator of property of nonresident may sue. Marvin v. Maysville St. R. Co. (U. S. C. C. D. Ky.), 49 Fed. 436. Administrator of person wilfully and maliciously killed cannot bring suit for damages against the slayer or the person causing it to be done. Morgan v. Thompson, 82 Ky. 383. Widow or minor children have a right of action for any killing of the husband or father, when done with a weapon, deadly in itself, or deadly when used in the manner in which used. Morehead v. Bittner, 20 Ky. L. Rep. 1986; 50 S. W. 857. Cause of action accrues at the time of death and not of injury. Garden v. Louisville & N. R. Co. (Ky.), 37 S. W. 839. In case of death from negligence, the petition need not allege that intestate left a wife or child, under Kentucky Const. sec. 241. East Tenn. Teleph. Co. v. Simms, 99 Ky. 404; 18 Ky. L. Rep. 761; 36 S. W. 171. Rehearing denied, 18 Ky. L. Rep. 764; 38 S. W. 131. The action could be maintained under the constitution, sec. 241, before the enactment of any statute. Thomas v. Royster, 98 Ky. 206; 17 Ky. L. Rep. 783; 32 S. W. 613; And the personal representative could sue under said sec. 241, for the negligent killing of an employee, even though he left neither widow, nor child. Lexington & C. C. Min. Co. v. Huffman, 17 Ky. L. Rep. 775; 32 S. W. 611. So the administrator, appointed for that purpose alone, of a decedent who is a nonresident and without property in the state, has a right of action for the gross negligence of a railroad company occasioning the intestate's death. Brown v. Louisville & N. R. Co., 17 Ky. L. Rep. 145; 30 S. W. 639. Kentucky Gen. Stat. ch. 57, sec. 3, is not repealed by Ky. Const. sec. 241, giving the personal representative the right to recover. Edmonson v. Ky. C. R. Co., 16 Ky. L. Rep. 459; 28 S. W. 789; Wright v. Woods, 16 Ky. L. Rep. 337; 27 S. W. 979. A recovery, however, cannot, it is held, be had for death by wilful neglect, under said statute, where deceased left neither widow, heir, nor personal representative. Louisville & N. R. Co. v. Coniff, 16 Ky. L. Rep. 296; 27 S. W. 865. See Cincinnati, O. & T. P. R. Co. v. Prewitt, 13 Ky. L. Rep. 474; 17 S. W. 484; Baker v. Louisville & N. R. Co., 13 Ky. L. Rep. 465; 17 S. W. 191. As to wilful negligence and repeal of statute, see Louisville & N. R. Co. v. Foard, 20 Ky. L. Rep. 646; 47 S. W. 342. As to parties, see Henderson v. Kentucky C. R. Co., 86 Ky. 389.

statute relating to railroads or street railways, the remedy is by indictment. There is also a right of action for damages given to the executor or administrator under this section, and also under the other statutes relating to common carriers, defective highways, etc. The recovery is for the use of the widow and children, if there are no children to the widow, or if no widow to the next of kin. Under the Employer's Liability Act, the legal representative in case the "death is not instantaneous, or is preceded by conscious suffering," may recover damages for the death or the injury. "Where the employee is instantly killed or dies without conscious suffering" the widow, or in case there is no widow, the next of kin, "who are dependent," may recover damages.[39] In Mississippi, the widow may sue for the husband, the husband for the wife, parent for the child and the child for the only parent.[40] In Nevada, the personal representative may sue. In New Mexico, under the act relating to certain common carriers, the husband or wife, or if none, or if he or she fails to sue within six months, the minor children may recover. If deceased was a minor and unmarried, the father and mother may join in the suit and have an equal interest in the judgment, or if either of them be dead the survivor may sue. The action is, however, brought by, or in the names of

[39] See chap. 37, herein, as to instantaneous death, and see sec. 853, herein. Only one of the remedies can be pursued by the administrator or executor, whether by indictment or in an action of tort. Doyle v. Fitchburg R., 162 Mass. 66, 71; 37 N. E. 770; 44 Am. St. Rep. 335; 25 L. R. A. 157, per Morton, J. As to nature of statute, see Hollenbeck v. Berkshire, etc., Co., 9 Cush. (Mass.) 478; Lyman v. Boston & A. R. Co. (U. S. C. C. D. Mass.), 70 Fed. 409. As to beneficiaries, see Commonwealth v. Boston & A. R. Co., 121 Mass. 36; Jones v. Boston & A. R. Co., 157 Mass. 51; Daly v. New Jersey Steel & I. Co., 155 Mass. 1. Before the enactment of the statute of 1886, ch. 140, authorizing such an action, a street railway corporation was not liable to an action for tort for the loss, by reason of its negligence or that of its servants, of the life of any person, whether a passenger or not. Syllabus to Holland v. Lynn & B. R. D., 144 Mass. 425; 11 N. E. 674. No action lies for death by negligence of a fellow servant. Dacey v. Old Colony R. Co., 153 Mass. 112; 26 N. E. 437. If a woman 4 or 5 months advanced in pregnancy, gives birth prematurely, by reason of an accident occasioned by a defective sidewalk, the child so born is not a "person" within Pub. Stat. ch. 52, sec. 17. Dietrich v. Northampton, 138 Mass. 14; 52 Am. Rep. 242.

[40] See Illinois C. R. Co. v. Hunter, 70 Miss. 171; Natchez Cotton Mills Co. v. Mullins, 67 Miss. 672.

the personal representative, under the general provision as to recovery for negligent death. In New Hampshire, the administrator may be plaintiff. In North Dakota and South Dakota (Dakota), in case of death under the railroad statute, the personal representative may sue "and recover damages, in the same manner that the person might have done for any injury, where death did not ensue." Under the general statute the widow, heir, or personal representative may sue.[41] In North Dakota, under the statute of 1899, the damages inure to the exclusive benefit of the heirs at law, in such shares as the judge shall fix, and he may for such purposes make any investigation he deems necessary. Under this statute the action is brought by the husband, or wife, or the surviving children, or the personal representative, and if the person entitled to bring the action refuses, or neglects so to do, for a period of thirty days after demand of the person next in order, such person may bring the same. In Ohio, the personal representative may sue, and the action is for the exclusive benefit of the wife, or husband, and children, or if none, of the parents or next of kin.[42]

[41] Under the Dakota Comp. L. sec. 5499, the widow, or if none, the heirs, have the prior and exclusive right to sue for the death of a husband and father. The personal representative may not sue for the benefit of the widow and children. Belding v. Black Hills & Ft. P. R. Co. (S. D.), 53 N. W. 750; 52 Am. & Eng. R. Cas. 624. The Comp. Stat. S. D. sec. 5499, does not so far conflict with public policy and statutory law of Minnesota that the courts will refuse to enforce it, as to the parties and right of action. Nicholas v. Burlington, C. R. & N. R. Co. (Minn. 1899), 80 N. W. 776. See Belding v. Black Hills & Ft. P. R. Co., 3 S. D. 369.

[42] The petition is sufficient when it avers that plaintiff sues as administratrix, etc., naming the next of kin, etc. Board of Comrs. v. Coffman, 18 O. Cir. Ct. R. 254; 10 O. C. D. 91. Administrator has no interest other than as nominal party. Wolf v. Ry. Co., 55 Ohio. St. 517. Administrator is not a nominal party merely but the real party, and controls and is responsible for the conduct of the case. Popp v. Cincinnati, H. & D. R. Co. (U. S. C. C. Ohio), 96 Fed. 465. Under the act as to death by wrongful act, etc., the action cannot be maintained if there be no widow or next of kin with a legal interest in the life lost, and this must be shown in the petition. Halloran v. Cleveland, P. & A. R. Co., 4 Ohio Dec. 14; 1 Cleve. Law Rec. 11. See also as to averment, Lima Elec. L. & P. Co. v. Deubler, 7 Ohio C. C. 185, under sec. 6134, Rev. Stat; and as to such averment being unnecessary where death was in another state, see Lake Shore & M. S. R. Co. v. Andrews, 14 Ohio C. C. 564. "Personal representatives," in secs. 6134, 6135, Rev.

In Rhode Island, every action must be brought by and in the name of the executor or administrator, whether appointed or qualified within or without the state. If the action is not brought in the name of the executor or administrator within six months after death, action may be brought in the names of the beneficiaries, either by all or by part thereof, stating that they sue for the benefit of all. Again, if the action is brought by the beneficiaries, no action shall be brought by the administrator or executor.[43] In Tennessee, a personal representative may sue; if he declines, the widow and children may bring suit; the widow may also sue in her own name, or if there be no widow, then the children. The action is for the benefit of the widow, if no widow, children or personal representative.[44] In Washington, the widow, or widow and children, or children may sue for the death of a person killed in a duel, and the heirs or personal representatives may sue for death by wrongful act, etc. Again, the father, or in case of his death or desertion, the mother or guardian may sue for the death of a child, and the heirs or personal representatives may sue for death by wrongful act, etc.[45] In New Brunswick, the executor or administra-

Stat., mean executors and administrators. Wittman's Execx. v. Cincinnati, H. & D. R. Co., 10 Ohio S. & C. P. Dec. 563. That no action can be maintained under Ohio Stat. March 25, 1851, when the act causing wrongful death occurred without the state, see Campbell v. Rogers, 2 Handy (Ohio), 110. That statute, giving legal representative of person lynched a right to recover a specified sum, is unconstitutional as fixing amount of damages, see Mitchell v. Champaign Co. (C. P.), 5 Ohio N. P. 158. Under act 1851, action lies, though no widow or children left, for benefit of next of kin. Lyons v. Cleveland & Tol. R. Co., 7 Ohio St. 336. As to beneficiaries, see Muhl v. Southern M. R. Co., 10 Ohio St. 272; Dunhene v. Ohio L. I. & T. Co., 1 Disney (Ohio), 257.

[43] When owners of mine not liable, under R. I. Pub. Stat. ch. 204, sec. 30; Myette v. Gross (R. I.), 30 Atl. 602. As to who entitled, see Goodwin v. Nickerson, 17 R. I. 478.

[44] Existence of beneficiary must be averred. Louisville & N. R. Co. v. Pitt, 91 Tenn. 86; 18 S. W. 118. As to mother and collateral relatives as beneficiaries, under Shannon's Code, sec. 4025, see Freeman v. Illinois Cent. R. Co. (Tenn. 1901), 64 S. W. 1.

[45] As to beneficiaries, see Northern P. R. Co. v. Ellison, 3 Wash. 225; 28 Pac. 233; 29 Pac. 263. The courts have adopted a narrow definition of the words "heirs" and "personal representatives." Peterman v. Northern Pac. R. Co. (U. S. C. C. Wash. E. D.), 105 Fed. 335 (secs. 4828–4838, Ballinger's Annot. Codes and Stats.), citing Noble v. City of Seattle, 19 Wash. 133; 52 Pac. 1013;

tor may sue, and the action is for the benefit of the wife, husband, parent, including grandparents, and children, including grandchildren. In Quebec, for death from an offense, or quasi offense, the consort, and ascendant and descendant relations are entitled to sue.

§ 851. Other general statutory provisions—Remedies—Defenses—One recovery—Settlement—Time limit for suing.[46] —In the District of Columbia, the recovery during life bars an action after death. In Georgia, there are also certain statutory provisions relating to the sale of unwholesome provisions, or adulterated drugs or liquors where, if death ensues, "the right of action shall be to the widow and children as prescribed in cases of physical injuries." In Kentucky "the failure to include any of the persons mentioned as defendants shall discharge them from liability," under the statute relating to duels. In Massachusetts, under the railroad and street railway act, the "exercise of due diligence" was required, of one not a passenger, to avoid the loss of life; nor is the railroad company liable "for the loss of life by a person while walking or being upon its road, contrary to law or to the reasonable rules and regulations of the corporation." And gross or wilful negligence or "acting in violation of law," contributing to the injury, is a defense under the act as to injury to a person or his property by collision at a railroad crossing; and the employee of a railroad or street railway corporation must have been exercising due care when killed, and so in case of defective highways. Again, where the remedy is by indictment or suit, "no executor or administrator shall for the same cause avail himself of more than one of the remedies."[47] In New Mexico, under

40 L. R. A. 822; Nesbit v. Ry. Co. (Wash.), 61 Pac. 141; Dueber v. Ry. Co. (U. S. C. C.), 100 Fed. 424. Code of Wash. sec. 8, and sec. 717, are inconsistent as to who entitled, and since both are re-enactments of prior statutes, they will be deemed continuations thereof, and sec. 8 is later and must prevail. Graetz v. McKenzie, 3 Wash. 194; 28 Pac. 331. The right given to heirs and personal representatives under sec. 8, Code, 1881, and that given by sec. 9, to a parent, are not inconsistent; and sec. 8, though passed later, does not repeal sec. 9. Hedrick v. Ilwaco R. & Nav. Co., 4 Wash. 400; 30 Pac. 714; 54 Am. & Eng. R. Cas. 45.

[46] See sec. 845, herein, for citation of statutes of states noted in text.

[47] See Clare v. New York & N. E. R. Co., 172 Mass. 211; 51 N. E. 1083;

the act relating to common carriers and defective highways, "the defendant for his defense," may show "that the defect or insufficiency" "was not a negligent defect or insufficiency." In North Dakota, the person entitled to sue may compromise the action and it will be binding. So in Ohio, the personal representative may, with the consent of the appointing court, settle with the defendant. In New Brunswick, not more than one action lies for the same subject matter, and the plaintiff or his attorney must deliver to the defendant "a full particular of the person" "in whose behalf the suit is brought, and of the manner in which the pecuniary loss to the different persons for whose benefit the action is brought is alleged to have arisen." In Quebec, only one action can be brought, and the judgment determines the proportion of the indemnity, which each of the beneficiaries is to receive. "These actions are independent and do not prejudice the criminal proceedings to which the parties may be subject." Again, the time limit for suing is one year after death, in the District of Columbia, Mississippi and Quebec; one year after the cause of action accrued, in New Mexico; twelve calendar months after death, in New Brunswick; one year, in Connecticut, under the general provision, after the neglect complained of, and in suits against railroad companies, within eighteen months after death; in Massachusetts, within one year from the accident, under the Employer's Liability Act, and within one year from the injury under the other acts; within two years after death in Ohio; so in New Hampshire and in Rhode Island, under the Laws of 1896; and so in Washington under the Code of 1891.[48]

13 Am. & Eng. R. Cas. N. S. 569. An indictment on St. 1840, ch. 80, which imposes a fine on any common carrier by whose negligence the life of a passenger is lost, "to be recovered by indictment to the use of the executor or administrator of the deceased person, for the benefit of his widow and heirs," must aver that he left a widow, or heirs, or both, as the case may be; and an averment that the defendant is liable to a fine, "to the use of J. S. who has been duly appointed administrator of said deceased, and the heirs at law of said deceased," is insufficient. Syllabus to Commonwealth v. Eastern R. Co., 5 Gray (Mass.), 473. See secs. 852, 866, 869, herein.

[48] Fraudulent concealment of cause of action will not prevent the statute from running. Whaley v. Catlett (Tenn.), 53 S. W. 131. Petition must show that action is brought within two years, under Gen. Stat. 1897, ch. 95, secs. 418, 419. City of Eureka v. Merrifield (Kan. App. 1899), 58 Pac. 243.

§ 852. Survival statutes.[49]—The cause of action is a survival one in Connecticut, as the cause of action which existed in the deceased person is kept alive.[50] So in New Hampshire the action survives to the extent specified in the statute.[51] And the Tennessee statute saves decedent's right of action for personal injuries for the benefit of his widow and next of kin.[52] The

[49] See sec. 845, herein, for citations of statutes of states noted in text.

[50] Budd v. Meriden Elec. Co., 69 Conn. 272; 37 Atl. 683; 3 Am. Neg. Rep. 335, 341, per Andrews, Ch. J. A suit may be brought in Massachusetts, under the Connecticut survival act, for a death occurring in that state, although the Massachusetts rules, fixing the elements of damage, govern. Higgins v. Central New Eng. & W. R. Co., 155 Mass. 176; 29 N. E. 534; 31 Am. St. Rep. 544.

[51] See Lyon v. Boston & M. R. Co. (U. S. C. C. D. Vt.), 107 Fed. 386, under Pub. Stat. N. H. 1901, ch. 191, secs. 8–12.

[52] Statute creates no new cause of action, but merely allows the survival of decedent's action. Whaley v. Catlett (Tenn.), 53 S. W. 131. Under Act, 1851, ch. 17, as Am'd Act 1871, ch. 78, the action abates upon death of one who left no widow, child, or next of kin, and does not survive for the benefit of creditors. East Tenn. V. & G. R. Co. v. Lilly, 90 Tenn. 563; 18 S. W. 243; 49 Am. & Eng. R. Cas. 495. Code, 1858, secs. 2591–2593, provided that action should not abate, but survive to personal representative for benefit of widow and next of kin, free from claims of creditors, and that personal representative might sue, if he declines, the widow and children may, without his consent, use his name. Felton v. Spiro (U. S. C. C. A. 6th C. E. D. Tenn.), 78 Fed. 576, per Taft, Cir. J., also declaring that if deceased has not sued before death the action passes without revivor. The action abates upon widow's death although a father of deceased survives who would have had an action if the widow had died before deceased. Louisville & N. R. Co. v. Bean, 94 Tenn. 388; 29 S. W. 370. Nor can an administrator revive, after the widow's death, an action then pending for her husband's death. Lougue v. Memphis & C. R. Co. (Tenn.), 19 S. W. 430. As to survival and non-abatement generally, see Abert & Lovejoy's Comp. Stat. Dist. Col. 1894 (Acts of Congress, Feb. 17, 1885; 23 Stat. 307, ch. 126, sec. 1), p. 457, sec. 81. See also id. p. 101, sec. 85, p. 459, sec. 82, p. 460, sec. 84, p. 290, sec. 15; 2 Ga. Code (Civ.), 1895, secs. 3825, 3828; Code, Ga. 1882, secs. 2967, 2971; Am'd Laws, 1889, No. 735, p. 73; No. 588, p. 43; Frazier v. Georgia, R. & B. Co., 101 Ga. 77; 28 S. E. 662; David v. South Western R. Co., 41 Ga. 223; Carroll's Ky. Stat. 1899, sec. 10, p. 180 (Act, July 3, 1893, ch. 1); Bardstown & G. R. Turnp. R. Co. v. Howell, 13 Ky. L. Rep. 563; 17 S. W. 481, under Ky. Gen. Stat. ch. 30, art. 1, sec. 11; Ky. Civ. Code, sec. 509; Wilkins v. Wainwright, 173 Mass. 212; 53 N. E. 397, under Mass. Pub. Stat. ch. 165. sec. 1; Bowes v. City of Boston and Fegan v. Same, 155 Mass. 344, 349, 350; 29 N. E. 633; 15 L. R. A. 365, per Knowlton, J.; McVey v. Illnois C. R. Co., 73 Miss. 487; 19 So. 209; 3 Am. & Eng. R. Cas. N. S. 371. Declaration must aver the survival. Beckman v. Georgia P. R. Co.

action given by the Nevada statute [53] is not a survival one, but a new right of action is created thereby; [54] so, also, in Indiana.[55]

§ 853. Massachusetts statute—Whether a strictly penal one.—In the following decision, in the United States circuit court,[56] it was declared that the Massachusetts statute mentioned in the opinion given below was not strictly penal, but that its substantial purpose was remedial. The question was whether said statute was not strictly penal so that the proceedings which it authorizes could not be taken in the Federal courts or in courts of foreign states. Deceased, a passenger, was at the time of her death, a resident of Massachusetts, and was killed in that state by one of the defendant's railroad locomotives. Defend-

(Miss.), 12 So. 956, under Miss. Code, secs. 2078, 2079; Rev. Codes, N. D. 1899, secs. 5234, 5978 (Code Civ. Proc.). Action survives against the executor or administrator, under Bates' Annot. Ohio Stat. 1902, p. 3076, sec. 6134. See further Eagle Paper Co. v. Bragg (Cin. Super. Ct.), 4 Ohio Dec. 194, under Ohio Rev. Stat. sec. 5159; Hendron v. Adin, 1 Cleve. L. Rep. 122; 4 Ohio Dec. 211; Baltimore & O. R. Co. v. Joy, 173 U. S. 226; 43 L. Ed. 677; 19 Sup. Ct. Rep. 387; 5 Am. Neg. Rep. 760, under Ohio Rev. Stat. sec. 5144 and U. S. Rev. Stat. sec. 955; Gen. Laws, R. I. 1896, p. 806, ch. 233, sec. 7; Sprague v. Greene, 20 R. I. 153; 37 Atl. 699, under R. I. Pub. Stat. ch. 189, secs. 5, 6; Lubrano v. Atlantic Mills, 19 R. I. 129; 32 Atl. 205; 34 L. R. A. 797, under R. I. Rev. Stat. 1857, ch. 176, holding that the survival applies to injuries not causing death. Shannon's Annot Code, Tenn. 1896, p. 986; secs. 4025 (2291), 3130; id. sec. 4568, p. 1134; id. secs. 4569 et seq.; id. p. 1111, secs. 4469 (2772),346; Mill & V. Code, Tenn. secs. 3130, 3469; Ballinger's Codes and Stats. Wash. 1897, sec. 4838. In the above statutes, however, the distinction should be kept in mind between the death action being a survival one, and statutes which merely operate to revive the cause of action which death abated. In Dueber v. Northern Pac. R. Co. (U. S. C. C. D. Wash. W. D.), 100 Fed. 424; 2 Ballinger's Ann. Codes and Stat. Wash. sec. 4828, is construed in connection with sec. 4838; held that actions and rights of action for personal injuries survive the death of the injured party only in those cases in which there is a surviving widow or children; and an administrator cannot maintain an action for wrongful death, unless he sues for the benefit of a widow, or widow and child, or widow and children, or a child or children of the deceased, citing Noble v. Seattle, 19 Wash. 133; 52 Pac. 1613; 40 L. R. A. 822; id. 425, per Hanford, Dist. J.

[53] Comp. Laws, p. 39, sec. 115.

[54] Roach v. Imperial Min. Co. (U. S. C. C. Nev.), 7 Fed. 698.

[55] Rev. Stat. sec. 284; Louisville E. & St. L. R. Co. v. Clark, 152 U. S. 230; 38 L. Ed. 422; 14 Sup. Ct. 579.

[56] Boston & M. R. R. Co. v. Hurd (U. S. C. C. A. 1st C. Dist. N. H.), 108 Fed. 116.

ant was incorporated by concurrent action of several states, including Massachusetts and New Hampshire. The case was reversed on other grounds than those considered in the opinion below, but the court expressed its views on the points involved in said opinion, "as it is impossible to foresee what phases the case may assume in the future." The court said: The most important question "we have to deal with is whether the Massachusetts statute is strictly penal. It is not sufficient that it is in the nature of a penal statute. The distinction between strictly penal or qui tam and one in the nature of a penal statute is pointed out in Huntington v. Attrill.[87] The proper test is that if it is strictly penal the remedy is subject to the control of the executive of the state by which the proceeding was authorized, and it may be at any time, either before or after judgment, annulled by a pardon. That its essential nature in this respect is not changed by a judgment was determined in Wisconsin v. Pelican Ins. Co.[88] The statutory remedy, on which this suit relies, is found in Pub. St. Mass. 1882, chapter 112, section 212. The section is divisible into two parts, the first part of which provides that the corporation shall be punished by fine. It fixes a maximum and minimum penalty without any guide for determining where the fine shall rest between the extremes. It is to be recovered by indictment and prosecuted within one year from the time of the injury. Being by indictment there is no occasion to indicate in the statute by what rule the court shall be guided in determining the amount of the fine as between the extremes named. In this respect the court is left, as in ordinary proceedings where a maximum and minimum fine is created by statute, to determine its amount by the degree of criminality. This is peculiarly appropriate to a statute strictly penal, because the question of the extent of a fine or other punishment is properly governed by local considerations acting upon judicial discretion, thus imposing a duty which a foreign court cannot well perform. The statute further provides that the fine shall be paid to the executor for the use of the widow and child, or, if no widow or child, to the next of kin. This and all the other peculiarities to which we have referred are indicia of a strictly

[87] 146 U. S. 637; 13 Sup. Ct. 224; 36 L. Ed. 1123.

[88] 127 U. S. 265; 8 Sup. Ct. 1370; 32 L. Ed. 239.

penal statute, because while the next of kin may possibly have an interest in the life of the person deceased, yet they do not necessarily, and the statute admits no inquiry whether or not they may have any. It is settled that the mere fact that the proceeding is by indictment does not necessarily determine its intrinsic purpose; yet if the statute stopped there it would seem impossible that there could be any proceedings in any other state than that where it was enacted. When a state sees fit to interpose its grand jury, and makes that an essential part of the proceeding, it is difficult to perceive how any other state could substitute other process therefor. . . . It is not necessary to go back in the legislation of Massachusetts to the origin of the first portion of section 212, chapter 112 of the Public Statutes to which we have referred. It was re-enacted in acts of 1881, chapter 199 from acts of 1874, chapter 372, section 163. The civil remedy which appears in the latter portion of section 212 is first found in sections 1 and 6 of chapter 199 of the acts of 1881, so that the remedy by indictment preceded the remedy by civil action. Not only, however, does the latter portion of section 212 confine the party prosecuting to elect between an indictment and a civil action, but in Littlejohn v. Railroad Co.,[59] it was held that the civil action is merely a substitute for the indictment. The various re-enactments contain no substantial changes. The act of 1874 by implication provided that the indictment would lie although the passenger deceased was not using due diligence; so also did section 1 of the act of 1881 giving a civil remedy. This was not in terms repealed in the latter portion of section 212 of chapter 112 of the Public Statutes, but undoubtedly, what appears on this point in its first part is intended to cover the whole section. Although the act of 1881 afforded a civil action, it was in all other respects on all fours with the proceeding by indictment. To emphasize that fact it provided that the damages should be assessed with reference to the degree of culpability of the corporation, which of course was not necessary in those portions of the various statutes which related to an indictment. Therefore, it would seem that, if one part of section 212 is strictly penal in its purpose, the other must be. On the other hand, in Stewart v. Railroad

[59] 148 Mass. 478, 482; 20 N. E. 103; 2 L. R. A. 502.

Co.,[60] to which we have already referred, it was held that a suit which the statutes of Maryland authorized to be brought, although in the name of the state was not penal in the international sense. The statute, however, as we have said, limited the remedy to the damages suffered." The court here reviews a number of decisions in this connection and concludes as to this point: "As it is quite apparent that the main purpose of the Massachusetts statute under discussion is compensation, although for the reasons which we have pointed out, in form and in other respects penal, it must be said that the liberal rules of the supreme court, to which we have referred, would not prevent our holding it remedial in an international sense, and in fact they favor our doing so." The court then considers Lyman v. Railroad Co., [61] where Judge Lyman held this statute strictly penal, and Perkins v. Railroad Co.,[62] where Judge Putnam follows Judge Carpenter and adds, "But there seems to be no authoritative decision which holds that both branches of the statute are strictly penal. The matter has not been directly decided by the supreme judicial court of Massachusetts, and its opinions on that topic use varying expressions." The court then reviews several cases,[63] and concludes as follows: "We may add that Shearman and Redfield [64] regards the statute in question here as strictly penal. Notwithstanding this, we on the whole conclude that its substantial purpose is remedial. If it still stood as originally framed and so permitted no form of proceeding except by indictment, we might find difficulty in giving it effect except in the courts of Massachusetts, but the civil remedy, given in the alternative as we have shown, is a flexible one, and although the declaration was finally based on the Massachusetts statute alone it leaves this case within the jurisdiction of the United States circuit court in the district of New Hampshire."[65]

[60] 168 U. S. 445; 18 Sup. Ct. 105; 42 L. Ed. 537.

[61] (U. S. C. C.) 70 Fed. 409.

[62] (U. S. C. C.) 90 Fed. 321.

[63] Commonwealth v. Boston & A. R. Co., 121 Mass. 36, 37; Commonwealth v. Boston & L. R. Corp., 134 Mass. 211, 213, 214; Littlejohn v. Railroad Co., 148 Mass. 482; 20 N. E. 104; Doyle v. Fitchburg R. Co., 162 Mass. 66, 71; 37 N. E. 770; State v. Manchester & L. R. Co., 52 N. H. 528, 547, 548, 549.

[64] Neg. (5th ed.) sec. 132.

[65] Boston & M. R. R. Co. v. Hurd (U. S. C. C. A. 1st C. Dist. N. H.), 108 Fed. 116, per Putnam, Cir. J.

Notwithstanding the above opinion it is decided in a Massachusetts case that the statute is a penal one, and that the word "damages" is not used in a strictly legal sense.[66] It is further declared that damages are to be assessed not more and not less than a certain amount, and with reference to the degree of culpability of the corporation, its servants and agents. Originally the remedy was by indictment, afterward it was extended to an action of tort.[67] It also said that the recovery is in substance a penalty given to the widow and children and next of kin, instead of to the commonwealth.[68] It is further declared, in another decision in this state, that the sum to be recovered "is primarily a penalty for the protection of the life of a workman."[69]

§ 854. Pecuniary loss.—Only the pecuniary loss sustained can be recovered.[70] In a recent decision it is said that the meas-

[66] Citing Sackett v. Ruder, 152 Mass. 397, 403.

[67] St. 187, ch. 381, sec. 39; St. 1874, ch. 372, sec. 163; St. 1881, ch. 199, secs. 1, 6.

[68] Doyle v. Fitchburg R. 162 Mass. 66; 37 N. E. 770; 44 Am. St. Rep. 335; 25 L. R. A. 157.

[69] The court also said: "In all cases the statute has the interest of the employees in mind. It is on their account that an action is given to the widow or next of kin. Whether the action is brought by them, or by the administrator, the sum to be recovered is to be assessed with reference to the degree of culpability of the employer or other negligent person." Mulhall v. Fallon, 176 Mass. 266, 269; 59 N. E. 386; 79 Am. St. Rep. 309, per Holmes, C. J.

[70] Louisville, E. & St. L. R. Co. v. Clarke, 152 U. S. 220; 14 Sup. Ct. Rep. 579; 38 L. Ed. 422, under sec. 284, Rev. Stat. Ind., a case of husband's death who was a passenger on defendant's cars. Commercial Club v. Hilliker, 20 Ind. App. 239; 50 N. E. 578, under Burns' Rev. Stat. 1894, sec. 285; Atchison, T. & S. F. R. Co. v. Ryan, 62 Kan. 682; 64 Pac. 603, under Civ. Code, sec. 422; Louisville & N. R. Co. v. Graham, 98 Ky. 688; 17 Ky. L. Rep. 1229; 34 S. W. 229. Deceased here was a father. The court rested evidently upon the Alabama law. Hardy v. Minneapolis & St. L. R. Co. (U. S. C. C. D. Minn.), 36 Fed. 657. Action was for death of boy of 16, crushed while uncoupling cars out of line of duty. Collins v. Davidson (U. S. C. C. Minn.), 19 Fed. 83, under chap. 77, sec. 2, Minn. Stat.; Thompson v. Chicago, M. & St. P. R. Co., 104 Fed. 845, under Neb. Comp. St. 1897, ch. 21; Hughey v. Sullivan (U. S. C. C. S. D. Ohio), 36 Ohio L. J. 247; Lake Shore & M. S. R. Co. v. Ehlert, 19 Ohio Cir. Ct. R. 177; 10 O. C. D. 443; Toledo St. R. Co. v. Mammet, 6 Ohio Cir. Dec. 544; 13 C. C. 591, holding that an instruction that only pecuniary damages could be allowed cured certain other errors in the charge. Hall v. Crain, 3 West. L. Month. 137, holding that the pecuniary injury would be considered even though no proof of direct damages was given. Steel v. Kurtz, 28 Ohio St. 191, holding that damages

ure of damages is the pecuniary injury to the wife or husband or children, or if there be neither of them then to the parent's next of kin of the deceased. The damages are limited to the pecuniary injury. The jury should be governed by the circumstances of each case as shown by the evidence and return the verdict for such an amount as the evidence shows the reasonable pecuniary loss to be, and if no pecuniary loss is proven, the verdict should be for the defendant. This pecuniary loss the jury is to estimate from the facts proven, and it has been held that the verdict must be based upon the evidence, but not that the evidence must create a certainty beyond what is possible in the nature of things, but in so far as the estimate relates to the future it should show a reasonable probability that the pecuniary loss would be equal to the amount found by the verdict. It has been held also that the amount of the damages must be ascertained by the jury from the proofs in the case and that the only question to be determined in estimating the damages is the pecuniary loss resulting from death to the widow and next of kin of such deceased person. Any fact which tends to show the amount of the pecuniary loss to the beneficiaries is competent evidence whether it tends to increase or diminish the damages. It is important, however, that the jury should not merely guess, but such facts should be established as will enable them to fix the amount of the pecuniary loss to each person entitled to share in the recovery, and the verdict should be confined by the jury to the amount of loss so proven.[71]

are to be ascertained from the proofs with reference to the pecuniary injuries. The Oregon (U. S. D. C. D. Or.), 45 Fed. 62, per Deady, J.; Smith v. Chicago & St. P. R. Co., 6 S. D. 583; 62 N. W. 967; 28 L. R. A. 573, under Dak. Comp. L. sec. 5499; Garther v. Kansas City, etc., R. Co. (U. S. C. C. W. D. Tenn.), 27 Fed. 544, holding that jury should be confined strictly to the estimate of pecuniary interest and that the sole question was the extent of the father's pecuniary interest in the life of the deceased daughter (citing Lett v. St. Lawrence, etc., R. Co., 11 Ont. App. 1; 21 Am. & Eng. R. Cas. 165; Little Rock, etc., R. Co. v. Barker, 39 Ark. 491; St. Louis, etc., R. Co. v. Freeman, 36 Ark. 41); Klepsch v. Donald, 4 Wash. 436; 30 Pac. 991; 31 Am. St. Rep. 936, holding that recovery is limited to the pecuniary loss proved, under Wash. Code, 1881, sec. 717. Atrops v. Castello, 8 Wash. 149; 35 Pac. 620, under Wash. Code Proc. sec. 139, holds, however, that special pecuniary damage need not be proven for the killing of an infant child.

[71] Cincinnati, St. R. Co. v. Altemeier, 60 Ohio St. 10, 41; O. L. J.

§ 855. Pecuniary loss—Continued.—In certain jurisdictions the character of the statute affects this rule of pecuniary loss. Thus, the value of the life of deceased to himself in the sense of his earning capacity under all circumstances, within the statutory limitation of damages, measures the recovery, although within such maximum limit substantial damages may be awarded.[72] Again, in Iowa and Oregon, the rule is that of compensation for the pecuniary loss caused to the estate of deceased.[73] And in Massachusetts, under the statute of 1882, chapter 112, section 212, the degree of culpability is a factor.[74] In another case the

245; 53 N. E. 300; 6 Am. Neg. Rep. 179, 181–183, per Burket, J. "It is a cold, unsympathetic and unimpassioned matter of dollars and cents, compensation for the loss of decedent's services as a bread and meat winner, so to speak. It is for the pecuniary loss to the wife and son that you are to compensate them and nothing else. The idea of punishment or of vindication for the wrong done . . . does not enter into the calculation in the least. They are entitled to recover, if you find them entitled to a verdict, whatever will fairly and reasonably compensate them for the loss of a husband and father upon whom they depended for sustenance and support." And the law measures the damages by the standard of pecuniary benefits to be derived and none other. "It cannot in the nature of the case be a matter of precise calculation. The law has no delicate scales to weigh the loss or damage. It depends upon the fairness, the good sense, the honesty and the justice of the jury to fix it impartially without prejudice and intelligently. So that on the one hand there shall be no excessive adjustment, nor on the other any undervaluation, but only adequate compensation under all the circumstances." Au v. New York, L. E. & W. R. Co. (U. S. C. C. N. D. Ohio), 29 Fed. 72, charge of Hammond, J., to the jury. There was a motion for a new trial upon exceptions to the charge and because the verdict was contrary to the law and the evidence, which motion was refused.

[72] Broughel v. Southern New Eng. Tel. Co., 73 Conn. 614; 48 Atl. 751.

[73] Lapsley v. Union P. R. Co. (U. S. C. C. N. D. Iowa), 50 Fed. 172; 51 Fed. 174; Morris v. Chicago, M. & St. P. R. Co. (U. S. C. C. N. D. Iowa), 26 Fed. 23, per Shiras, J., charging the jury; Spaulding v. Chicago, St. P. & K. C. R. Co., 98 Iowa, 205; 67 N. W. 227; Worden v. Humeston & S. R. Co., 72 Iowa, 201; 33 N. W. 629; Ladd v. Foster (U. S. D. C. Or.), 31 Fed. 827–832, per Deady, J.; Civ. Code, sec. 367. But see Sherman v. Western Stage Co., 24 Iowa, 550. See as to estate, next following note herein.

[74] See sec. 845, herein, as to statutes. See Boston & M. R. R. Co. v. Hurd (U. S. C. C. A. 1st C. Dist. N. H.), 108 Fed. 116, and see opinion given in sec. 853, herein, whether statute is penal. Mulhall v. Fallon, 176 Mass. 266, 269; 57 N. E. 386; 79 Am. St. Rep. 309, per Holmes, C. J. Action here was under Stat. 1887, ch. 270, sec. 2, being the Employer's Liability Act. Doyle v. Fitchburg R., 162 Mass. 66, 71; 37 N. E. 770;

court said, "If you find for the plaintiff, you will allow him such damages as you deem to be reasonably sufficient to make good to the heirs of the deceased the pecuniary loss to them, occasioned by his death, not exceeding the sum of five thousand dollars."[75] While it is also declared that the word "pecuniary" is not to be strictly construed,[76] so the words used as expressing the measure of recovery are the financial loss sustained by deceased's family.[77] And it is also decided that only the actual money value of decedent's life can be recovered;[78] and that the recovery for the death of a young child killed by defendant's cars is limited to compensatory damages.[79]

§ 856. Pecuniary loss—Pleadings. — It has been decided that special pecuniary loss need not be alleged, but that proof of all damages naturally and necessarily resulting from the killing may be given under a general allegation of damages;[80] nor need the complaint set forth how the plaintiffs were pecuniarily injured, nor allege special damages to them.[81]

45 Am. St. Rep. 335; 25 L. R. A. 157. per Morton, J. Action was under Pub. Stat. ch. 112, sec. 212. Bowes v. City of Boston; Fegan v. Same, 155 Mass. 344; 29 N. E. 633; 15 L. R. A. 365, where the distinction between the statutes is pointed out, per Knowlton, J., id. pp. 349, 350. One action for the injury surviving for the benefit of the estate and the damages being estimated on the theory of compensation, and the other statute giving a recovery for the benefit of the widow, etc., based on the degree of culpability, there being a maximum of damages specified. Examine as to Employer's Liability Act, Burns' Rev. St. Ind. 1894, sec. 7085; Horner's Rev. Stat. 1897, sec. 5206t; Hunt v. Connor (Ind. App. 1901), 59 N. E. 50.

[75] Collins v. Davidson (U. S. C. C. D. Minn.), 19 Fed. 83–87, under Minn. Stat. ch. 77, sec. 2. It was also said that the pecuniary loss and the deprivation of future pecuniary advantage measured the damages. Id.

[76] City of Vicksburg v. McLain, 67 Miss. 4; 6 So. 774.

[77] Smith v. W. Powell Co. (Civ. Super. Ct.), 27 Ohio L. J. 267.

[78] Louisville & N. R. Co. v. Graham, 98 Ky. 688; 34 S. W. 229.

[79] Givens v. Kentucky C. R. Co., 11 Ky. L. Rep. 452; 12 S. W. 257.

[80] District of Columbia v. Wilcox (D. C. App.), 22 Wash. L. Rep. 623.

[81] Erb v. Morasch, 8 Kan. App. 61; 54 Pac. 323, writ of error dismissed 60 Kan. 251; 56 Pac. 135. See also Lyons v. Cleveland & T. R. Co., 7 Ohio St. 336. But in Western U. Tel. Co. v. McGill (U. S. C. C. A. 8th C. Dist. Kan.), 57 Fed. 699, 701, per Sanborn, C. J., it is said that the pecuniary loss must both be alleged and proved, and also that beneficiaries must be shown to exist. So in Halloran v. Cleveland, P. & A. R., Clev. Rec. 11, it is decided that beneficiaries having a pecuniary in-

§ 857. Punitive, exemplary or vindictive damages.—Such damages may be given in Connecticut[82] and Kentucky,[83] and exemplary damages may be given, even though an indictment lies for the same offense.[84] So they may be recovered where deceased himself, had he survived, could have had such damages.[85] The giving of punitive damages, however, under chapter 57, section 3, of the statute of that state, rests in the jury's discretion and they should not be instructed that they "should" award such damages,[86] nor that they "ought" to give them.[87] And, when the recovery is sought against a railroad company for

terest must be shown. In Tucker v. Draper (Neb. 1901), 86 N. W. 917; 10 Am. Neg. Rep. 307, under Comp. Stat. ch. 21, the allegation was, "By reason of the death of said Harry Draper, the plaintiff has been damaged by reason of the loss of service and society and fellowship of the said Harry Draper in the sum of $5,000," but the court, although it asserts the doctrine that the pecuniary injury must be alleged and proved, upon a general demurrer, evidently considered the averment sufficient, citing and considering Hurst v. Railway Co., 84 Mich. 539; 48 N. W. 44; Orgail v. Railroad Co., 46 Neb. 4; 64 N. W. 450; Electric Co. v. Laughlin, 45 Neb. 391; 63 N. W. 941; Railroad Co. v. Van Buskirk, 58 Neb. 252; 78 N. W. 514; City of Friend v. Burleigh, 54 Neb. 674; 74 N. W. 50. See last preceding section herein, notes.

[82] See Murphy v. New York & N. H. R. Co., 29 Conn. 496; 30 Conn. 184. Examine Waldo v. Goodsell, 33 Conn. 432; Goodsell v. Hartford & N. H. R. Co., 33 Conn. 51. See also secs. 852, 866, 869 herein, as to physical suffering of deceased and survival statutes.

[83] Under the constitution, sec. 241, compensatory and punitive damages are recoverable for death by gross negligence. Louisville & N. R. Co. v. Kelly, 100 Ky. 421; 19 Ky. L. Rep. 78; 40 S. W. 452, denying rehearing 19 Ky. L. Rep. 69; 38 S. W. 852; 7 Am. & Eng. R. Cas. N. S. 165. So also for death by negligence. East Tenn. Teleph. Co. v. Sims, 18 Ky. L. Rep. 764; 38 S. W. 131, denying rehearing 99 Ky. 404; 18 Ky. L. Rep. 761; 36 S. W. 171. And under the general statute if the act is wilful, or the negligence gross, punitive damages may be awarded. Carroll's Ky. Stat. 1899, sec. 6, p. 180; Act July 3, 1893, ch. 1; Pennsylvania Co. v. Malia, 20 Ky. L. Rep. 1623; 49 S. W. 809. So vindictive damages may be given for killing with deadly weapons. Carroll's Ky. Stat. 1899, sec. 4, p. 179. And under the Gen. Stat. Ky. ch. 57, sec. 3, punitive damages were recoverable for wilful neglect causing death. So under Gen. Stat. ch. 32, sec. 1, such damages may be recovered for killing in a duel, or for aiding and promoting said duel.

[84] Chiles v. Drake, 2 Metc. (Ky.) 146; 74 Am. Dec. 406.

[85] Bowler v. Lane, 3 Metc. (Ky.) 311.

[86] Louisville & N. R. Co. v. Brooks, 83 Ky. 129.

[87] Kentucky C. R. Co. v. Gastineau, 83 Ky. 119.

killing a child, punitive damages cannot be given merely because the engineer's attention was momentarily diverted from the track while the train was passing through a populous city street.[88] So a judgment for negligent killing of the intestate will be reversed, if for punitive damages, when there is no evidence sufficient to support such award.[89] But a verdict will not be reversed under a statute which permits a recovery for the injured party's sufferings, and also exemplary damages.[90]

§ 858. Same subject continued.—In Nevada, such pecuniary and exemplary damages as the jury shall deem fair and just may be awarded, under one of the rights of action given by the statute;[91] while in Tennessee, the statute provides for a class of damages which come generally within the designation of punitive or exemplary damages,[92] and in that state they are held to be recoverable, whether or not the injury causes instantaneous death,[93] although it is expressly decided that the enactment does not permit the recovery of exemplary damages, since they will not be allowed where there is no express provision therefor.[94] In Washington, the statute allows such pecuniary or exemplary damages as under all the circumstances of the case may seem just to the jury.[95] But death, caused by negligently letting off a blast, has been decided not to justify giving punitive damages to the father of deceased.[96] Again, in New

[88] Louisville & N. R. Co. v. Creighton, 20 Ky. L. Rep. 1691, 1898; 50 S. W. 227; 15 Am. & Eng. R. Cas. N. S. 713. That recovery for death of 9 years' old child is limited to compensatory damages, see Givens v. Kentucky C. R. Co., 11 Ky. L. Rep. 452; 12 S. W. 257.

[89] Chesapeake & O. R. Co. v. Judd, 20 Ky. L. Rep. 1978; 50 S. W. 539.

[90] Newport News & M. V. R. Co. v. Dentzel, 12 Ky. L. Rep. 626; 14 S. W. 958.

[91] Comp. Laws, Nev. 1900, sec. 3984, (Civ. Proc.), act approved Feb. 28, 1871, 90. So under Nev. Comp. Laws, p. 39, sec. 115, Roach v. Imperial Min. Co. (U. S. C. C. D. Nev.), 7 Fed. 698; 7 Sawy. 224. See sec. 869, herein.

[92] See sec. 871, herein; Shannon's Annot. Code, Tenn. 1896, sec. 4029 (3134).

[93] Haley v. Mobile & O. R. Co., 7 Baxt. (Tenn.) 239, under Code, sec. 2291.

[94] Illinois Cent. R. Co. v. Crudup, 63 Misc. 291 (under Tenn. statute).

[95] Ballinger's Codes and Stats. Wash. 1897, sec. 4828; Hill's Ann. St. and Codes, 1891 (Code Proc.), sec. 138 (8).

[96] Atrops v. Costello, 8 Wash. 149; 35 Pac. 620 (under sec. 139 of Code). But see Klepsch v. Donald, 4 Wash. 436; 30 Pac. 991; 31 Am. St. Rep. 936.

Mexico, the jury may consider aggravating circumstances and give compensatory or exemplary damages.[97] So, if an employer exhibits a conscious indifference and want of care as to circumstances occasioning an employee's death, exemplary damages are recoverable, although they are not justified in case of mere neglect, however gross, of an employee, resulting in a fellow servant's death, unless the employer retained or employed such negligent employee knowing of his unfitness, or otherwise ratified his acts.[98] In other states, however, no vindictive or exemplary damages are recoverable.[99]

§ 859. General elements of damages.—In a case under the United States statute,[100] in the District of Columbia, where deceased was employed as a car inspector, the jury were charged that his age, health, strength and capacity to earn money, as shown by the evidence, his family, who they are and what they

[97] Comp. Laws, 1897, p. 810, sec. 3215; Comp. Laws, 1884, am'd 1891, ch. 49, sec. 2310.

[98] Cerrilos Coal R. Co. v. Deserant, 9 N. M. 49; 49 Pac. 807, citing Lake Shore & M. S. R. Co. v, Prentice, 147 U. S. 101; 37 L. Ed. 97, which held that a railroad corporation was not liable to punitive damages for an illegal, wanton and oppressive arrest of a passenger, by the conductor of a train, when it in no way authorized or ratified the act.

[99] Higgins v. Central New Eng. & W. R. Co., 155 Mass. 176, 181; 29 N. E. 534; 31 Am. St. Rep. 544. Punishment or vindication for the wrong done not to be considered, etc. Au v. New York, L. E. & W. R. Co. (U. S. C. C. N. D. Ohio), 29 Fed. 72, charge of Hammond, J., to jury. See also opinion of Burket, J., in Cincinnati St. R. Co. v. Altemeier, 60 Ohio St. 10; 41 Ohio L. J. 245; 53 N. E. 300; 6 Am. Neg. Rep. 179. The question is not one of punishment for the negligence. Garther v. Kansas City, etc., R. Co. (U. S. C. C. W. D. Tenn.), 27 Fed. 544, per the court. No exemplary damages or vindictive damages by way of punishment allowed. Holmes v. Oregon & Cal. R. Co. (U. S. D. C. D. Oregon), 5 Fed. 523, under sec. 367, Civ. Code. "The primary purpose of the modern statute, like that of the ancient custom, is to provide compensation for the injury rather than to inflict punishment for the wrong, yet in estimating the damages for the former, it may be well to remember that the liability to pay them may have the effect to inculcate a wholesome regard for human life and compel carriers and corporations, having the persons of passengers and employees in their care, to a faithful discharge of their duty towards them." Holland v. Brown (U. S. D. C. D. Oregon), 35 Fed. 43, 49, per Deady, J. See Perham v. Portland Gen. Elec. Co., 33 Or. 451; 53 Pac. 14; 40 L. R. A. 799.

[100] Act of Congress, Feb. 17, 1889, 23 Stat. at L. 307, ch. 126.

consist of, and what the reasonable expectation his family had of receiving if he had not been killed should be considered.[1] It may also be stated that the general evidential factors constituting the basis of pecuniary loss are age, sex, mental and physical health and life expectancy, occupation, earnings and earning capacity, ability and skill to labor mentally or physically, experience, habits of industry, frugality, saving, temperance, or the contrary, and generally all the circumstances which are relevant and material, in showing or tending to show the pecuniary loss sustained, or which may properly aid the court or jury in estimating such loss,[2] but earning capacity only within

[1] Mackey v. Baltimore & P. R. Co. (D. C.), 18 Wash. L. Rep. 767; Baltimore & P. R. Co. v. Mackey, 157 U. S. 72; 39 L. Ed. 624; 15 Sup. Ct. Rep. 491, opinion by Mr. Justice Harlan; Pennsylvania Co. v. Roy, 102 U. S. 451, dis'd. See Russell and Winslow's Syl. Dig. U. S. Sup. Ct. Rep. p. 200, for citations of this case.

[2] *Georgia.* Boswell v. Barnhart, 96 Ga. 521; Christian v. Columbus & R. Co., 90 Ga. 124; 155 E. 701; Central R. & Bkg. Co. v. Rouse, 80 Ga. 442; Central R. Co. v. Thompson, 76 Ga. 770; David v. Southwestern R. Co., 41 Ga. 223.

Indiana. Louisville & St. L. R. Co. v. Clarke, 152 U. S. 220; 14 Sup. Ct. Rep. 579; 38 L. Ed. 422, under sec. 284, Rev. St. (holding that age, life expectancy, occupation, ability to labor and accustomed earnings are all proper elements, and that testimony as to deceased's income was competent); Chicago & E. R. Co. v. Thomas, 155 Ind. 634 (holding the presumption exists that the services of a deceased husband and father were valuable). In Malott v. Shimer, 153 Ind. 35; 54 N. E. 101; 6 Am. Neg. Rep. 263; 15 Am. & Eng. R. Cas. N. S. 774, deceased had retained his position for 17 years as a United States postal employee. He was 50 years old, in good health, and received a salary of $1150 annually. His habits were good, and he was always at work and was frugal; held that $5,000 was not excessive. And it has been held, where deceased was temperate, industrious and frugal, in good health with a life expectancy of 38 years, and capable of earning $50 a month, that $9,400 was not excessive. Pittsburgh, C. C. & St. L. R. Co. v. Burton (Ind.), 37 N. E. 150. So deceased's physical ability and occupation affect his probable accumulations. Ohio & M. R. Co. v. Voight, 122 Ind. 288; 23 N. E. 774. And there is an unavoidable inference that deceased was engaged in earning money to support his wife and child. Louisville, N. A. & C. R. Co. v. Buck, 116 Ind. 566; 19 N. E. 453; 2 L. R. A. 520; 28 Am. L. Reg. 148. In Board of Commrs. v. Legg, 110 Ind. 479; 11 N. E. 612, deceased was a laboring man, etc., and $5,000 was held not excessive. And in Commercial Club v. Hilliker, 20 Ind. App. 239; 50 N. E. 578, it is held that if a verdict is excessive, in view of the earning capacity of deceased and the relations sustained towards the beneficiaries it will be reversed. See further as to age, etc., Ohio &

a reasonable time prior to the death will be considered.[3] Again, evidence is relevant that deceased held certain public offices and of his income therefrom, although it is not competent as fur-

M. R. Co. v. Hill, 7 Ind. App. 255; 34 N. E. 646.

Iowa. The ability to earn money is one of the factors constituting a basis for recovery, and age, health and strength should be considered. Lapsley v. Union P. R. Co. (U. S. C. C. N. D. Iowa), 50 Fed. 172, aff'd 51 Fed. 174. And deceased's occupation, age, health and habits of industry, sobriety and economy and probable duration of life are proper elements of damage. Kelley v. Central R. of Iowa (U. S. C. C. Iowa), 48 Fed. 663. So the age of the wife and any fact showing her ability to earn money are proper elements of damages. Morris v. Chicago, M. & St. P. R. Co. (U. S. C. C. N. D. Iowa), 26 Fed. 23. And, in an action for a railway employee's death, it may be proved that the intestate had been an apprentice at the plasterer's and bricklayer's trade for two or three years before he went to work for the railway company, and while he had not fully learned the plasterer's business, yet that he could do a good day's work at it. It may also be shown that the average wages paid to plasterers at the time of deceased's death was $4 per day. Grimmelman v. Union P. R. Co., 101 Iowa, 74; 70 N. W. 90; 8 Am. & Eng. R. Cas. N. S. 321; 1 Am. Neg. Rep. 237, per Deemer, J., citing Rayburn v. Railway Co., 74 Iowa, 643; 33 N. W. 606; 38 N. W. 520. So habits of frugality may be shown, and evidence also is relevant of investments in life insurance to show such habits. Spaulding v. Chicago, St. P. & K. C. R. Co., 98 Iowa, 205; 67 N. W. 227. And intelligence, good habits, health and life expectancy, constitute a factor in determining whether the damages are excessive. Hass v. Chicago, M. & St. P. R. Co. (Iowa), 57 N. W. 894. So age, health, earnings and occupation were considered, and $5,000 held not excessive. Lowe v. Chicago, St. P. & O. R. Co., 89 Iowa, 420; 56 N. W. 519. And age, health, life expectancy, habits, means, earnings, business skill and ability to labor, are competent evidence to show the present worth of decedent's life. Wheelan v. Chicago, M. & St. P. R. Co., 85 Iowa, 167; 52 N. W. 119; 49 Am. & Eng. R. Cas. 693. And evidence of the habits and character of deceased, and as to his sobriety and industry, are admissible to show the loss to his estate and the value of his services. Van Gent v. Chicago, M. & St. P. R. Co., 80 Iowa, 526; 45 N. W. 913. See further Beems v. Chicago, R. I. & P. R. Co., 67 Iowa, 435; 25 N. W. 693; Brown v. Chicago, etc., R. Co., 64 Iowa, 662.

Kansas. Age, sex, circumstances and condition, habits, character, capacity and business, are relevant. Missouri P. R. Co. v. Moffatt, 60 Kan. 113; 55 Pac. 837; 12 Am. & Eng. R. Cas. N. S. 397. So where deceased earned from $60 to $75 a month, and was 34 years old, $4,500 was recovered. St. Louis & S. F. R. Co. v. French, 56 Kan. 584; 44 Pac. 12. In another case, deceased had earned as high as $5 per day and

[3] Central of Ga. R. Co. v. Perkerson, 112 Ga. 923; 38 S. E. 365; 52 L. R. A. 210.

nishing a basis of computation for pecuniary loss beyond the unexpired term thereof.[4] And it has also been held that the value of deceased's life to his family should be based upon his

was capable of earning $42 a month; he was of sound body, good health, had a life expectancy of 25 years, was industrious, etc.—$7,830, was recovered. Atchison, T. & S. F. R. Co. v. Hughes (Kan.), 40 Pac. 919.

Kentucky. In this state the loss of the power of the deceased to earn money is the basis of the damages, and in determining this, age, probable duration of life, and earning capacity may be considered. Chesapeake & O. R. Co. v. Lang, 100 Ky. 221; 19 Ky. L. Rep. 67; 40 S. W. 451, modifying 19 Ky. L. Rep. 65; 38 S. W. 503, petition for modification denied 19 Ky. L. Rep. 68; 41 S. W. 271. So earning capacity and life expectancy are relevant factors. Southern R. Co. v. Evans, 23 Ky. L. Rep. 568; 63 S. W. 445, as are also age and state of health. Southern R. Co. v. Barr (Ky.), 55 S. W. 900. See also Louisville & N. R. Co. v. Shumaker (Ky.), 53 S. W. 12, rehearing denied 56 S. W. 155, citing several cases; Kentucky Cent. R. Co. v. Gastineau, 83 Ky. 119. Although a distinction seems to be made in the cases between the deceased's power to earn money, and his capacity to earn money, or his probable earnings, the two latter factors not being the measure of damages except in so far as they are relevant in connection with the former. Louisville & N. R. Co. v. Eakins, 20 Ky. L. Rep. 736, 933; 45 S. W. 529; 46 S. W. 496; 47 S. W. 872. See Linss v. Chesapeake & O. R. Co. (U. S. C. C. D. Ky.), 91 Fed. 964; Southern R. Co. v. Evans, 23 Ky. L. Rep. 568; 63 S. W. 445; Louisville & N. R. Co. v. Ward, 19 Ky. L. Rep. 1900; 44 S. W. 1112; Chesapeake & O. R. Co. v. Lang, 100 Ky. 22; 19 Ky. L. Rep. 67; 40 S. W. 451, petition to modify denied 19 Ky. L. Rep. 68; 41 S. W. 271; Kentucky C. R. Co. v. Gastineau, 83 Ky. 119; Louisville & N. R. Co. v. Taafe, 21 Ky. L. Rep. 64; 50 S. W. 850; 15 Am. & Eng. R. Cas. N. S. 693; Louisville & N. R. Co. v. Clark, 20 Ky. L. Rep. 1375; 49 S. W. 323; 12 Am. & Eng. R. Cas. N. S. 407; Chesapeake & O. R. Co. v. Dixon, 20 Ky. L. Rep. 792 (1883); 47 S. W. 615; 50 S. W. 252; 14 Am. & Eng. R. Cas. N. S. 827; Louisville & N. R. Co. v. Milet, 20 Ky. L. Rep. 532; 46 S. W. 498; Louisville & N. R. Co. v. Berry, 16 Ky. L. Rep. 722; 29 S. W. 449; Louisville & N. R. Co. v. Morris, 14 Ky. L. Rep. 466; 20 S. W. 539. Again where deceased's yearly income was $630, and he attended to business, was sober, quiet, industrious, prudent and his life expectancy was 26.72 years, a verdict of $6,908.98 was held not excessive in favor of minor children. Louisville & N. R. Co. v. Graham, 98 Ky. 688; 17 Ky. L. Rep. 1229; 34 S. W. 229. But a charge which directs the jury to consider the business, habits and earning capacity of deceased in connection with his probable net earnings during his life expectancy and which gives undue prominence to such expectancy is objectionable. McClurg v. Inglehart, 17 Ky. L. Rep. 913; 33 S. W. 80. Although where deceased was intelligent, 29 years old, healthy, earning $2.50 per day

[4] Christian v. Columbus & R. R. Co., 90 Ga. 124; 15 S. E. 701.

probable earnings, and the gross amount of the value of the life should be reduced to its present value.[5] Ability to earn is not however the exclusive test, but anticipations of pecuniary ben-

and was an excellent workman, $15,000 was held not excessive. Louisville & N. R. Co. v. Shivell, 13 Ky. L. Rep. 902; 18 S. W. 944.

Massachusetts. Evidence is admissible as to the habit and customary way of deceased in doing his work, such testimony being competent for the purpose of showing to the jury what kind of a man deceased was in respect to health, vigor and activity, and his bodily and mental peculiarities. It is also admissible to show his condition as to sobriety and apparent health and vigor immediately before his death. Overman Wheel Co. v. Griffin (U. S. C. C. A. 1st C. D. Mass.), 67 Fed. 659, 661. per Webb, Dist. J., under Act, 1887, ch. 270. A father's earnings may affect the question of damages to dependents. Houlihan v. Connecticut River R. Co., 164 Mass. 555; 42 N. E. 108.

Minnesota. Deceased's age, habits of industry, accustomed earnings, measure of success in business and any evidence tending to show what was the reasonable expectation of pecuniary benefit is competent. Collins v. Davidson (U. S. C. C. D. Minn.), 19 Fed. 83, quoted in Serensen v. Northern Pac. R. Co. (U. S. C. C. N. D. Mont.), 45 Fed. 407, 411. So where deceased's age, sex, ability, earnings, earning capacity, occupation, and that he was in perfect and vigorous health were considered, $2,500 held not excessive. Sieber v. Great Northern R. Co., 76 Minn. 269; 79 N. W. 95. So decedent's calling, income and success in life are factors. Hutchins v. St. Paul, M. & M. R. Co., 44 Minn. 5; 46 N. W. 79. See further Bolinger v. St. Paul & D. R. Co., 36 Minn. 418; 31 N. W. 856; Shaber v. St. Paul, M. & M. R. Co., 28 Minn. 103; 9 N. W. 575.

New Hampshire. In this state the capacity of deceased to earn money may be considered in connection with other elements of damage, under the Pub. Stat. 1901, p. 629, sec. 12. Statutes considered in Lyon v. Boston & M. R. Co. (U. S. C. C. D. Vt.), 107 Fed. 386.

Ohio. Earning capacity and probable future life are factors. Farmers' Loan & T. Co. v. Toledo, A. & N. M. R. Co. (U. S. C. C. N. D. Ohio, W. D.), 67 Fed. 73, per Ricks, Dist. J. So also are the physical condition, habits, industry and age of decedent. Atkyn v. Wabash R. Co. (U. S. C. C. N. D. Ohio), 41 Fed. 193; 22 Ohio L. J. 151. So the occupation, age, physical condition, capacity as a man of business and earning power, etc., are elements of damages in an action for a husband's death. Au v. New York, L. E. & W. R. Co. (U. S. C. C. N. D. Ohio), 29 Fed. 72. See opinion in this case under sec. 854 herein as to pecuniary loss. And the age, health and ability to make and save money, may be shown. Cincinnati St. R. Co. v. Altemeier, 60 Ohio St. 10; 41 Ohio L. J. 245; 53 N. E. 300; 3 Am. Neg. Rep. 179, 181. So age and life expectancy were considered in Wheelan v. Chicago, M. & St. P. R. Co. (Ohio), 52 N. E. 119; 49 Am. & Eng. R. Cas. 693. And where deceased was a switchman,

[5] Atlanta & W. P. R. Co. v. Newton, 85 Ga. 517; 11 S. E. 776.

efit reasonably to be expected are also important, and so when coupled with the fact that the actual relations of the deceased with respect to the beneficiaries were such as to justify such

whose wages were $40 a month of which the family received from $300 to $350 yearly, the verdict was reduced to $5,000. Lake Shore & M. S. R. Co. v. Schultz, 9 Civ. Dec. (Ohio) 816, 824; 19 C. C. 539. While in another case, where deceased was a woman of frail appearance and suffered with heart disease and from a previous accident and was 68 years old, $2,500 was held excessive, the value of her services not having been shown. Bond Hill v. Atkinson, 9 Civ. Dec. (Ohio) 185; 16 C. C. 470, rev'g 2 Dec. 48; 1 N. P. 166. Again, age, health, expectancy of life and the wages deceased was able to earn, are factors. Smith v. W. Powell Co. (Cin. Super. Ct.), 27 Ohio L. J. 267.

Oregon. Age, health, habits and disposition and capacity to labor and make and save money and acquire property must be considered. Also the fact that deceased was a skilled workman is an important factor. Holland v. Brown (U. S. D. C. D. Oregon), 35 Fed. 43. In this case deceased was about 40 years old and in good bodily health and strength. He was not in the full sense of the term a skilled workman, but his brother, the libelant, was a master ship carpenter and the deceased worked at and about this business and was considered a willing, "handy man." He was employed about half the time at $5 a day. Another master workman said he paid for the same kind of work $4 a day. He was a "good fellow," given more or less to drink and dissipation when not employed, and although he had no one but himself to support he died worth nothing. There were some circumstances however which tend to show that a short time before his death, he had gone to live with his brother, the libelant, and was intending and attempting a new and better life. He does not appear to have been married and his relatives, so far as the evidence discloses, are the libelant and a sister. Id. 48. $2,500 was awarded. See also secs. 872–875, herein, and cases cited. But if the proof is confined to the earning capacity, habits and life expectancy of deceased, an instruction against exemplary damages is unnecessary. Perham v. Portland Gen. Elec. Co., 33 Or. 451; 53 Pac. 14; 40 L. R. A. 799. And where the measure of damages is the pecuniary loss to deceased's estate, the earning power of a healthy man living on his income includes in so far as an advantage to such estate is concerned, his ability or capacity to manage affairs and his skill in the management of wealth. Skottowe v. Oregon S. L. & U. N. R. Co., 22 Or. 430; 30 Pac. 222; 12 Ry. & Corp. L. J. 112. So probable net earnings based upon age, probable duration of life, earnings, habits, disposition and capacity to labor and save should be considered. Carlson v. Oregon Short Line & U. N. R. Co., 21 Or. 450; 28 Pac. 497.

Tennessee. The statute of this state permits life expectancy to be considered. Illinois Cent. R. Co. v. Crudup, 63 Miss. 291. And deceased's age, health, strength, vigor, life expectancy and earnings will be considered, nor will a verdict of $10,000 be set aside even though

expectations.[6] And the damages should be such in Iowa as will compensate the estate, and they are not limited to a sum, the interest on which will produce deceased's probable earnings for a period equal to his life expectancy.[7] Again, while earning power will be considered, yet this does not include deceased's earning power to any particular beneficiary.[8] Still another rule has been stated and that is, that a compensatory sum for the destruction of decedent's life and the value of his power to labor is not the true criterion of damages, but that his power to earn money constitutes the measure thereof,[9] although in a later case in the same state it is decided that the damage to the estate is the measure of compensation based upon the destruction of deceased's power to earn money, in the ascertainment of which the life expectancy of deceased and his earning capacity are factors.[10] So it is improper to tell the

deceased had failed in business as the result of obligations he had been compelled to pay as surety and he was doing business under his wife's name. Rosenbaum v. Shoffner, 98 Tenn. 624; 40 S. W. 1086. See Illinois C. R. Co. v. Spence, 93 Tenn. 173; 23 S. W. 211; Tennessee, C. & R. Co. v. Roddy, 85 Tenn. 400; 5 S. W. 286. But evidence is not admissible as a basis of damages as to the minimum value of crops on deceased's farm for same year prior to his death. Louisville & N. R. Co. v. Howard, 90 Tenn. 144; 19 S. W. 116.

Washington. Age of deceased at the time he was killed, probable duration of life, mental and physical condition, ability to earn money and support and maintain family and care for and protect and educate them are factors. Northern Pac. Co. v. Freeman (U. S. C. C. A. 9th C. Wash.), 27 C. C. A. 457; 48 U. S. App. 757; 83 Fed. 82, Ross, Cir. J., gave dissenting opinion in case, citing R. Co. v. Goodman, 62 Pac. St. 329; Cregin v. Railroad Co., 19 Hun (New York, 343). Again, deceased was an ordinary laborer, but was working in a saloon at his death. He had never earned more than $50 a month and was only receiving $30 a month when killed. He was 42 years old—$30,000 excessive. Anderson v. Northern P. R. Co., 19 Wash. 340; 53 Pac. 345. So age, monthly earnings, ability as a good business manager, occupation, industry, sobriety, expectancy of life, good health, and that he was kind were considered and $25,000 held sufficient damages. Walker v. McNeil, 17 Wash. 582; 50 Pac. 518.

[6] Diebold v. Sharpe, 19 Ind. App. 474; 49 N. E. 837.

[7] Spaulding v. Chicago, St. P. & R. R. Co., 98 Iowa, 205; 67 N. W. 227.

[8] Linss v. Chesapeake & O. R. Co. (U. S. C. C. D. Ky.), 91 Fed. 964.

[9] Louisville & N. R. Co. v. Ward, 19 Ky. L. Rep. 1900; 44 S. W. 1112. See also Chesapeake & O. R. Co. v. Lang, 100 Ky. 221; 19 Ky. L. Rep. 68; 41 S. W. 271, denying modification in 19 Ky. L. Rep. 65, 67; 38 S. W. 503; 40 S. W. 451; Kentucky, C. R. Co. v. Gastineau, 83 Ky. 119.

[10] Southern R. Co. v. Evans, 23 Ky.

jury to award such a sum as will reasonably compensate the wife and child.[11] Again, it is determined that the amount of earnings during the expectancy of life is not the basis of calculation as both elements are uncertain, the matter being one within the jury's discretion.[12]

§ 860. General elements of damages—Continued—Carefulness, prudence and experience.—In a comparatively recent decision the question asked and admitted over objection was, "What sort of a man he was—as to whether or not he was a careful man in and about his work as a railroad man or otherwise." The witness had known deceased for a number of years and had frequently seen him work, and saw him almost every day during the last few years of his life and had worked with him. The court said: "The loss from the death of a careful and experienced railroad man would be greater than that from one who was careless and inexperienced. The law estimates the value of a human life as best it can, and in doing so will take into consideration among other things the habits of the individual as to sobriety and industry and such qualities as affect his capacity to earn money. The evidence in question was not improper to go to the jury upon the question of damages. Upon a proper request the court should limit by a proper instruction such evidence to the particular question upon which it is competent."[13] In another decision, however, the plaintiff was allowed to prove that deceased was "a careful, prudent and cautious engineer," and this was decided to be error, it being declared that it was undoubtedly proper to prove that deceased was a competent engineer for the purpose of showing his earning capacity, but that that did not authorize questions of the character under consideration.[14]

§ 861. General elements of damages—Continued—Decreas-

L. Rep. 568; 63 S. W. 445. See secs. 854–855, 872–875, herein.

[11] Louisville & N. R. Co. v. Shumaker (Ky. 1899), 53 S. W. 12.

[12] Illinois C. R. Co. v. Spence (Tenn.), 23 S. W. 211.

[13] Pittsburgh, C. C. & St. L. R. Co. v. Parish (Ind. App. 1902), 62 N. E. 514, 519, 520, per Robinson, J., citing a number of cases.

[14] Mosnut v. Chicago & N. W. R. Co. (Iowa, 1901), 86 N. W. 297; 10 Am. Neg. Rep. 40, 41, per Sherwin, J. See Louisville & N. R. Co. v. Stacken, 86 Tenn. 343; 6 S. W. 737.

ing and increasing capacity of deceased.—Decreasing earning capacity and ability to labor in declining years of life, constitute relevant factors in estimating damages.[15] And the increase of ability is also to be considered.[16] But on the other hand, even though deceased had reached an advanced age, yet his probable ability to perform his duties as a railroad engineer was considered in connection with the fact that he was strong and robust and that his earnings exceeded twelve hundred dollars a year.[17] But where the damages rest upon the destruction of deceased's power to earn money, the jury need not be instructed as to deductions of reasonable and necessary expenses from gross earnings, in case they are of opinion that deceased's earning power would be no greater during the remainder of life.[18]

§ 862. General elements of damages—Continued—Hazards of employment.—The dangers and extra hazard to life because of the nature of the employment are material and should be considered.[19]

§ 863. General elements of damages—Continued—Promotion and extra skill.—It is decided that although those employed in the same labor as deceased, who was a locomotive fireman, were sometimes promoted at increased wages to the

[15] Western & A. R. Co. v. Moore, 94 Ga. 457; 20 S. E. 64. See also Farmers' Loan & T. Co. v. Toledo, A. & N. M. R. Co. (U. S. C. C. N. D. Ohio W. D.), 67 Fed. 73, per Ricks, Dist. J.; Central R. & Bkg. Co. v. Rouse, 80 Ga. 442; 5 S. E. 627; Spaulding v. Chicago, St. P. & K. C. R. Co., 98 Iowa, 205; 67 N. W. 227; Louisville & N. R. Co. v. Stacker, 86 Tenn. 343; 6 S. W. 737.

[16] Central R. & Bkg. Co. v. Rouse, 80 Ga. 442; 5 S. E. 627.

[17] Western & A. R. Co. v. Hyer, 113 Ga. 776; 39 S. E. 447. Deceased was 64 years old, and a verdict of $5,500 was held not excessive. So in another case deceased was 73 years old but he was engaged in business and was strong and vigorous for his age—$1,000 to his children, he being a widower, and they not being dependent upon him for support. City of Wabash v. Carver, 129 Ind. 552; 29 N. E. 25; 35 Am. & Eng. Corp. Cas. 556; 13 L. R. A. 851.

[18] Louisville & N. R. Co. v. Kelley, 100 Ky. 421; 19 Ky. L. Rep. 78; 40 S. W. 452, denying rehearing 19 Ky. L. Rep. 69; 38 S. W. 852; 7 Am. & Eng. R. Cas. N. S. 165.

[19] Central R. & Bkg. Co. v. Rouse, 80 Ga. 442; 5 S. E. 627; Farmers' Loan & T. Co. v. Toledo, A. & N. M. R. Co. (U. S. C. C. N. D. Ohio W. D.), 67 Fed. 73, per Ricks, Dist. J.

position of locomotive engineers, yet such evidence is incompetent in the absence of proof that the intestate possessed the requisite skill at his decease to have become an engineer.[20] This case is, however, cited in another decision to the point that evidence is inadmissible that deceased was in the line of promotion at the time of receiving his fatal injuries.[21] The fact has, however, been considered without discussion, in determining whether the damages were excessive, that deceased was one of the best of the company's employees.[22]

§ 864. General elements of damages—Continued—Different occupations.—The value of the intestate's services in the various occupations in which he has been engaged may properly be admitted as relevant.[23] So the fact whether the employment is continuous is a factor.[24] But where it does not appear that deceased had ever followed more than one occupation, witnesses cannot testify as to what he could have made at certain other kinds of employment.[25]

§ 865. General elements of damages—Continued—Deductions—Expenses, etc.—Disposition of earnings.—In Georgia, the Code[26] provides for a recovery for the full value of the life of deceased as shown by the evidence, without any deductions for necessary or other personal expenses of deceased had he lived.[27] But it has been held in that state that gross earnings, individual expenses and net earnings should all be considered.[28] Again, evidence is admissible as to earnings that the decedent paid a certain amount to his wife each month after paying a cer-

[20] Brown v. Chicago, R. I. & P. R. Co., 64 Iowa, 652; 21 N. W. 193.

[21] Hesse v. Columbus, S. & H. R. Co., 58 Ohio St. 167; 39 Ohio L. J. 344; 50 N. E. 354.

[22] Louisville & N. R. Co. v. Shivell (Ky.), 18 S. W. 944.

[23] Christian v. Columbus & R. R. Co., 90 Ga. 124; 15 S. E. 701.

[24] Ladd v. Foster (U. S. D. C. D. Or.), 31 Fed. 827, 832, 853; The Oregon (U. S. D. C. D. Or.), 45 Fed. 62, per Deady, J.

[25] Atlantic & W. P. R. Co. v. Newton, 85 Ga. 517; 11 S. E. 776; 45 Am. & Eng. R. Cas. 211.

[26] See secs. 845, et seq., herein, for citations of statutes.

[27] See Boswell v. Barnhart, 96 Ga. 521; 23 S. E. 414.

[28] Central R. & Bkg. Co. v. Rouse, 80 Ga. 442; 5 S. E. 627; 77 Ga. 393; 3 S. E. 307. See also as to the earlier rule for deductions, Augusta & K. R. Co. v. Killian, 79 Ga. 234; 4 S. E. 165.

tain amount for board, and that he had no resources except his earnings.[29] So in Indiana, the disposition of earnings by turning money over to the wife is proper evidence in an action against a railroad employer,[30] and expenditures, including household and earning expenses of deceased's family prior to his death may be proved.[31] So the amount of money sent to relatives by the intestate and his investments are competent on the question of earning capacity.[32] In Iowa, the recovery is to be measured by the amount which would have probably been saved to decedent's estate if he had lived.[33] So net earnings, after allowing all expenses, has been stated as the amount recoverable.[34] So in Kentucky, the necessary and probable personal expenses of deceased may be considered by the jury, although it is not required that they should be so instructed.[35] It is determined, however, in another case, that deceased's living expenses should not be deducted from his earning power extended to his life

[29] Western & A. R. Co. v. Moore, 94 Ga. 457; 20 S. E. 640.

[30] Lake Erie & W. R. Co. v. Mugg, 132 Ind. 168; 31 N. E. 564.

[31] Hudson v. Houser, 123 Ind. 309; 24 N. E. 243.

[32] Spaulding v. Chicago, St. P. & K. C. R. Co., 98 Iowa. 205; 67 N. W. 227.

[33] Kelley v. Central R. of Iowa (U. S. C. C. Iowa), 48 Fed. 663. See Southern R. Co. v. Barr (Ky. 1899), 55 S. W. 900; Louisville & N. R. Co. v. Shumaker (Ky. 1899), 53 S. W. 12, rehearing denied 56 S. W. 155; Louisville & N. R. Co. v. Eakins, 20 Ky. L. Rep. 736, 933; 45 S. W. 529; 46 S. W. 496; 47 S. W. 872.

[34] Morris v. Chicago, M. & St. P. R. Co. (U. S. C. C. N. D. Iowa), 26 Fed. 23.

[35] Southern R. Co. v. Evans, 23 Ky. L. Rep. 568; 63 S. W. 445. See also Louisville & N. R. Co. v. Milet, 20 Ky. L. Rep. 532; 46 S. W. 498, to the point that the jury need not be charged to deduct living expenses. Need not ask jury to deduct from gross earnings necessary reasonable expenses during his life expectancy. Louisville & N. R. Co. v. Kelley, 100 Ky. 421; 19 Ky. L. Rep. 78; 40 S. W. 452, denying rehearing 19 Ky. L. Rep. 69; 38 S. W. 852; 7 Am. & Eng. R. Cas. N. S. 165. See as to deduction of deceased's living and other expenses when absent from home, Louisville & N. R. Co. v. Kelley, 100 Ky. 421; 19 Ky. L. Rep. 69; 7 Am. & Eng. R. Cas. N. S. 165; 38 S. W. 852, rehearing denied 19 Ky. L. Rep. 78; 40 S. W. 452. The amount expended by deceased upon himself was considered in Louisville & N. R. Co. v. Graham, 98 Ky. 668; 17 Ky. L. Rep. 1229; 34 S. W. 229. But an instruction which gives undue prominence to deceased's life expectancy, as where the jury is directed that in estimating the actual damage they will consider the probable net earnings of deceased for that period in view of his capacity to earn and his business habits, is objectionable. McClurg v. Inglehart, 19 Ky. L. Rep. 913; 33 S. W. 80.

expectancy.[35] In other decisions the disposition of his wages by deceased have been considered by the courts in reviewing the case.[37] So personal expenses and the net sum over are factors in an action against an employer,[38] and in case of deceased seamen deductions for the cost of clothing and other expenses on shore are to be considered.[39] Again, as we have shown under another section herein, there are certain expenses for maintenance, etc., of minor children which are material factors.[40]

§ 866. General elements of damages—Continued—Survival action.—In Connecticut as we have elsewhere stated, the action is a survival one, and the measure of damages would be based upon elements showing the value of deceased's life to himself, so that his age, state of his health and earning capacity under all the circumstances should be considered.[41]

§ 867. General elements of damages—Continued—Death of children.—Necessarily in the case of children who are wrongfully or negligently killed, the inquiry resolves itself into the factors of minority and majority, and beyond that the first question is whether the minor is of very tender years or has reached an age of any discretion and ability to labor and be of any useful service. In the case of adult children, much the same general elements of damage would be relevant as in case of other adults, having regard of course to relations of dependency and other matters considered elsewhere herein. But it may be stated that the general elements of damages in case of minors are age, sex,

[35] Chesapeake & O. R. Co. v. Lang, 100 Ky. 221; 19 Ky. L. Rep. 65; 38 S. W. 503, modified 40 S. W. 451, petition to modify denied, 19 Ky. L. Rep. 67, 68; 41 S. W. 271.

[37] Deceased son, a switchman, was about 27 years old, unmarried, and gave his mother his wages. Welch v. New York, N. H. & Hfd. R. Co., 176 Mass. 393, 397, under the Employer's Liability Act, Stat. 1887, ch. 270, am'd by Stat. 1892, ch. 260. So the question of the disposition by a daughter of her wages was considered by the supreme court in discussing the question of dependency. Houlihan v. Connecticut R. R. Co., 164 Mass. 555, 557, per Barker, J. See opinion under secs. 872–876, herein.

[38] Smith v. W. Powell Co. (Cin. Super. Ct.), 27 Ohio L. J. 267.

[39] The Oregon (U. S. D. C. D. Or.), 45 Fed. 62; Stat. Or. sec. 37, Comp. 1887.

[40] See secs. 890–892, herein.

[41] Broughel v. Southern New England Tel. Co., 73 Conn. 614; 48 Atl. 751. As to survival statutes, see sec. 852, herein.

whether such child is of sufficient years to have ability to labor or work, or to exercise discretion. Youth and inexperience, physical and mental condition and ability, intelligence, brightness, character or disposition, willingness to work, and kind of work done in case of young children, health and strength, mental and physical, amount of earnings, probable earnings and earning capacity, where minors are of age to labor and perform valuable services, occupation, and in some cases, their life expectancy beyond minority. Underlying all these elements, however, is the proviso, as we have stated elsewhere, that the value of a minor's services is subject to certain deductions or expenditures for support, education, etc.[42] Again, inability to earn constitutes an element for consideration.[43] In stating the above general elements, however, we do not assert that all the above elements are necessary to be alleged or proven in any given case, although they constitute proper evidence.[44]

[42] See secs. 890–892, herein.

[43] See secs. 809–892, herein.

[44] In the following decisions the relevancy of the evidence set forth in the text is frequently not discussed, but merely considered in review.

Georgia. Mother need not allege that minor son ever worked or earned money; an averment of dependency is sufficient. It is the cash value of the life that is to be given, and not the gross amount of earnings during life expectancy, and jury may consider age, earnings at time of death, earning capacity, life expectancy, occupation. Augusta R. Co. v. Glover, 92 Ga. 706; 18 S. E. 406; 58 Am. & Eng. R. Cas. 269. The instruction in this case was held erroneous in omitting certain matters as to life expectancy.

Indiana. Age, physical and mental ability should be considered. City of Elwood v. Addison (Ind. App. 1901), 59 N. E. 47. Deceased was a minor son, healthy and ordinarily intelligent, was 12 years old, had gone to school, and learned to read, cipher and write and was a good boy to work and helped to do the chores. $1,000 to the father held not excessive. New York C. & St. L. R. Co. v. Mushrush (Ind. App. 1894), 37 N. E. 954. Deceased son's age was 19 and he was in good health, strong and intelligent, and earned $2.25 a day. $3,000 held not excessive. Chicago & E. R. Co. v. Branyan (Ind. App.), 37 N. E. 190. So the pecuniary loss to deceased's father and mother as next of kin depends upon the circumstances and not upon his probable earnings. Louisville, N. A. & C. R. Co. v. Wright, 134 Ind. 509; 34 N. E. 314, under Ind. Rev. Stat. 1881, sec. 284. It was also decided in this case that the probability that the parents would have survived deceased had he not been killed or that he would not have married affect his probable earnings.

Iowa. The probability that a deceased minor female would have chosen a particular occupation, and the wages or salary generally paid in that occupation or employment

§ 868. General elements of damages—Continued—Ladd v. Foster—Holmes v. Railway.—The following decisions have been so frequently cited that the following extracts therefrom

have been considered as proper elements. Eginoire v. Union Co. (Iowa, 1900), 84 N. W. 758. Father of minor may recover his earnings in excess of cost of his support. Hopkinson v. Knapp & S. Co., 92 Iowa, 212; 60 N. W. 652. Youth and inexperience of deceased were factors in determining whether an instruction to the jury was erroneous or not. Andrews v. Chicago, M. & St. P. R. Co. (Iowa), 53 N. W. 399; 52 Am. & Eng. R. Cas. 252; 12 Ry. & Corp. L. J. 296.

Kansas. The value of a minor son's services does not necessarily limit the recovery. Atchison, T. & S. F. R. Co. v. Cross, 58 Kan. 424; 49 Pac. 599. Deceased adult son's age and earnings considered. St. Louis & S. F. R. Co., 56 Kan. 584; 44 Pac. 12.

Minnesota. Deceased adult was a young man; he earned from $60 to $70 a month. His health was perfect and vigorous and his habits industrious, but he had not accumulated anything. $2,500 held not excessive. Sieber v. Great Northern R. Co., 76 Minn. 269; 79 N. W. 95. Age and health of a minor son of six years and that he was of ordinary intelligence and promise were the sole evidence of damages. $3,000 held to be excessive. Gunderson v. Northwestern El. Co., 47 Minn. 161; 49 N. W. 694.

Mississippi. Deceased was a minor of tender years employed as clerk and earned a reasonable sum, and averments thereof show that he was of years of discretion but his inexperience, peculiar character and disposition should be alleged in an action to recover for death from the sale of a deadly drug to him. Meyer v. King (Miss.), 16 So. 245.

Ohio. Probable duration of child's life, its earning capacity and inability to earn during its tender years are factors, as is also the probability that for years it would be a burden upon its parents. Baltimore & O. R. Co. v. Helenthal (U. S. C. C. A. 6th C. S. D. Ohio), 31 C. C. A. 414; 60 U. S. App. 156; 88 Fed. 116, 121; 40 Ohio L. J. 248. As to effect of youth and inexperience upon future earnings of minor son, see Andrews v. Chicago, M. & St. P. R. Co. (Ohio), 53 N. W. 399; 12 Ky. & Corp. L. J. 296; 52 Am. & Eng. R. Cas. 252. Mother cannot prove loss of services when the brothers and sisters and not the mother are next of kin. Hall v. Crain (Ohio), 3 West. L. Month. 137. Deceased was 23 years old, healthy, earned $1.80 a day, etc. $5,000 held not excessive. Toledo St. R. Co. v. Mammet, 6 Cir. Dec. (Ohio) 544; 13 C. C. 591.

South Dakota. That adult son was strong, healthy and a good laboror were considered as factors. Smith v. Chicago, M. & St. P. R. Co., 6 S. D. 583, 62 N. W. 967; 28 L. R. A. 573.

Washington. As to child's earnings, see Atrops v. Castello, 8 Wash. 148; 35 Pac. 620. If it has been testified to by the attending physician that the deceased child was frail and weak, he cannot further testify that if the infant had been a healthy child it would have survived the injury. Ilwaco R. & Nav. Co. v. Hedrich, 1 Wash. 446; 25 Pac. 335.

will be of value. In Ladd v. Foster,[45] the rule in Holmes v. Railway Co.[46] is evidently followed, viz, in estimating the damages, "the age, health, habits of industry and sobriety and mental and physical skill of the deceased, so far as they affect his capacity for rendering useful services to others or acquiring property must also be considered. Under the statute the life of the deceased is valued according to his capacity and disposition to be useful, to labor and save. The industrious, provident and skilled are worth more than the indolent, improvident and ignorant, and the death is to be compensated for accordingly."[47] In the Holmes' case the fact was also considered that deceased was a single man and in addition to the rule above stated the court said: "This is the law. Expectancy of life should also be considered, and also the fact that deceased had no trade, or calling by which he could earn anything, save that of a common laborer, and in this case it appears that deceased was indolent, or inefficient and inclined to intemperance, that his family were glad

[45] (U. S. D. C. D. Or.) 31 Fed. 827, 832, 853.

[46] (U. S. D. C. D. Or.) 6 Sawy. 293; 5 Fed. 523.

[47] Deceased was 34 years old. Had been married 9 years, 8 of which had been spent in Oregon. Household expenses were about $25 a month. House rent was $1 a month and taxes. He had no trade or special vocation and had worked one year for wages during his residence in Oregon, but where and what at did not appear. He had taken up railroad land and a year before his death was in the real estate and employment business, from which he made about $100 a month. About six years before his death he received about $2,500 from his father and his effects when he died consisted of about 160 acres of land, personal property, cash and notes appraised at a little over $2,000. He had also policies of insurance on his life. "From this it appears that since he was helped by his father he has gone backward rather than forward pecuniarily. He was in the habit of frequenting saloons, drank more or less, and treated liberally, spending from $1 to $3 a day in that way. He often spent the night in the saloon or tavern, leaving his wife and children at home alone. It will be seen from this outline that Taylor's means of making money were both limited and precarious and that he had little if any faculty or disposition to save and accumulate. With a household expenditure of only $300 a year he had gone behind the last six years of his life, notwithstanding the capital received from his father. He was doubtless what is called a good fellow. . . . I am satisfied that his death is no serious loss to his family, or estate, or that his income would ever much exceed his personal expenses. In my judgment the damages that the libelant ought to recover on account of his death ought not to exceed $1,500."

to accept charity from comparative strangers, although the deceased was apparently in good health, and although he might, if he would, have earned three or four hundred dollars a year, he could only furnish his mother about one hundred dollars a year." [48]

§ 869. Sufferings, loss of time, etc., of injured person.— In determining whether or not damages may be allowed for the sufferings of the injured person, the primary consideration is the nature of the remedy given by the statute. In some of the states, as we have seen,[49] there is a cause of action which survives or a survival action and one for the death itself. So compensation for bodily pain and suffering is recoverable where the injured party sues, and after his death the action is continued by his administrator.[50] If the statute merely permits a recovery for the death itself, damages cannot be allowed for the pain and suffering, mental or physical, of the injured person.[51] The rule is otherwise, however, where the character of the statute is such that these elements of damages and also that for loss of time survive.[52]

[48] Holmes v. Oregon & C. R. Co. (U. S. D. C. D. Ore.), 5 Fed. 523.

[49] See sec. 852, herein. See also Cowen v. Ray (U. S. C. C. A. 7th C. Dist. Ind.), 108 Fed. 320, considering Rev. Stat. Ind. secs. 7083, 7085. The general law as to death being stated, id. sec. 385. See Thornton's Ind. Stat. 1897, sec. 272.

[50] Muldowney v. Illinois C. R. Co., 36 Iowa, 362.

[51] Dwyer v. Chicago, St. P. & M. R. Co., 84 Iowa, 479; 51 N. W. 244; 35 Am. St. Rep. 322; Donaldson v. Mississippi & M. R. Co., 18 Iowa, 280; 87 Am. Dec. 391, under Iowa Code, sec. 2525, providing that all causes of action shall survive, etc. Louisville & N. R. Co. v. Sander, 19 Ky. L. Rep. 1941; 44 S. W. 644; Hall v. Crain (Ohio), 3 West. L. Month. 137; 2 Ohio Dec. 453; Au v. New York, L. E. & W. R. Co. (U. S. C. C. N. D. Ohio), 29 Fed. 72, charge of Hammond, J., to jury; Holland v. Brown (U. S. D. C. D. Or.), 35 Fed. 43, 48, under Comp. Stat. Or. 1887, sec. 37; Carlson v. Oregon Short Line & U. N. R. Co., 21 Or. 450; 28 Pac. 497; Ladd v. Foster (U. S. D. C. D. Or.), 31 Fed. 827, 832; R. I. Rev. Stat. 1857, ch. 176, creating a right of action for death provides as to survival only to cases of injuries not causing death and is exclusive of a right to recover for the pain and expense suffered by intestate. Lubrano v. Atlantic Mills, 19 R. I. 129; 32 Atl. 205; 34 L. R. A. 797. See Kansas Pac. R. Co. v. Cutter, 19 Kan. 83.

[52] Murphy v. New York & N. H. R. Co., 29 Conn. 496; 30 Conn. 184. Examine Budd v. Meriden Elec. R. Co., 69 Conn. 272; 37 Atl. 683; 3 Am. Neg. Rep. 335, per Andrews, Ch. J., as to the effect of the statutes of that state. Hurlburt v. Topeka (U. S. C. C. D. Kan.), 34 Fed. 510. This case was an action by the administrator for the death of a woman caused by the

In Kentucky the personal representative might, under the general statute,[53] recover damages in the same manner that the person himself might have done for any injury where death did not ensue.[54] And damages may be awarded for the pain and suffering as well as for the death of one killed by negligence, unless a motion is made that plaintiff elect which cause of action he relies on.[55] But an administrator in an action for the death cannot join the constitutional remedy[56] with the common-law cause

city's negligence as to its streets. The syllabus to the case is as follows: "Comp. Laws, Kan. 187, sec. 420, provides that 'in addition to the causes of action which survive at common-law causes of action . . . for an injury to the person . . . shall also survive,' and by sec. 422, it is enacted that the personal representatives of one whose death has been caused by wrongful act may maintain an action therefor, the damages recovered therein to 'inure to the exclusive benefit if any of the widow and next of kin.' Held that the right of action in favor of the personal representatives under sec. 422, was exclusive and that such representative had no right of action under sec. 420, for injuries to the person, where the injuries were such as to cause death." It is also held that an action for personal injuries, not resulting in death, survives under Civ. Code, sec. 420, if death was from other causes; but if death results from the injuries, the personal representative cannot sue for the benefit of the estate, but the action is for the benefit of the next of kin under Civ. Code, sec. 422. Martin v. Missouri P. R. Co., 58 Kan. 475; 49 Pac. 605; 7 Am. & Eng. R. Cas. N. S. 576; 3 Am. Neg. Rep. 165 (citing Andrews v. Hartford & N. H. R. Co., 34 Conn. 57; Read v. Great Eastern R. Co., L. R. 3 Q. B. 555; Holton v. Daly, 106 Ill. 131; Chicago & E. I. R. Co. v. O'Connor, 119 Ill. 586, 9 N. E. 263; 19 Ill. App. 591). Damages recoverable are only such as were sustained by the injured person in his lifetime. Missouri P. R. Co. v. Bennett, 5 Kan. App. 231; 47 Pac. 183; 14 Nat. Corp. Rep. 6, aff'd 49 Pac. 606; 7 Am. & Eng. R. Cas. N. S. 534. See also Atchison, T. & S. F. R. Co. v. Chance, 57 Kan. 40; 45 Pac. 60; 4 Am. & Eng. R. Cas. N. S. 328. Damages for pain and suffering from the injury as well as for loss of time survives under Kansas statute. Atchison, T. & S. F. R. Co. v. Rowe, 56 Kan. 411; 43 Pac. 683. But see Kansas Pac. R. Co. v. Cutter, 19 Kan. 83.

[53] Ch. 57, sec. 1.

[54] Givens v. Ky. C. R. Co., 11 Ky. L. Rep. 452; 12 S. W. 257. See Cincinnati, N. O. & T. P. R. Co. v. Prewitt, 13 Ky. L. Rep. 474; 17 S. W. 484, as to difference between secs. 1 and 3, of said statute.

[55] Louisville & N. R. Co. v. Miniard, 20 Ky. L. Rep. 2023; 50 S. W. 962. See also Baker v. Louisville & N. R. Co., 13 Ky. L. Rep. 465; 17 S. W. 191; Newport News & M. V. R. Co. v. Dentzel, 12 Ky. L. Rep. 626; 14 S. W. 958; Louisville & N. R. Co. v. Earl, 94 Ky. 368; Louisville & N. R. Co. v. Coniff, 90 Ky. 560. Contra Louisville & N. R. Co. v. Sander, 19 Ky. L. Rep. 1941.

[56] Const. sec. 241.

of action for the injured person's physical suffering prior to his death.[57] But it is also decided in that state that where deceased is killed through negligence of a railroad company, his physical suffering consequent upon the injury is not an element of damages, unless such injury was the result of gross or wilful neglect, etc.[58]

§ 870. Same subject continued.—In Massachusetts the right of action under section 17 of the statute as to defective highways[59] is independent of the right of action given by section 18 of the same chapter. The statute creating it was enacted at a different time and for a different purpose. The right to recover damages suffered in his lifetime by one who dies from an injury received on a highway, survives to his administrator for the benefit of his estate, and the damages are estimated on the theory of making compensation.[60] The action by an administrator under section 17, for loss of life, is to recover a limited sum for the benefit of a certain designated class of persons. Both actions may proceed at the same time on independent grounds and for different purposes.[61] Under the Employer's Liability Act of that state, an action lies by the legal representative for both the injury to and the death of an employee, and damages may be awarded for both under certain conditions as to instantaneous death, so that conscious suffering of the injured party to the time of his death may be a ground of recovery.[62]

[57] Owensboro & N. R. Co. v. Barclay, 19 Ky. L. Rep. 997; 43 S. W. 177. The husband's statutory action (Gen. Stat. ch. 57, sec. 3) is more advantageous than his common-law right of action. Louisville & N. R. Co. v. McElwain, 98 Ky. 700; 18 Ky. L. Rep. 379; 34 S. W. 236; 34 L. R. A. 788; 3 Am. & Eng. R. Cas. N. S. 309. The common-law right of action is not abrogated by the statute as to death. Newport News & M. V. R. Co. v. Dentzel, 12 Ky. L. Rep. 626; 14 S. W. 958.

[58] Louisville & N. R. Co. v. Coniffs' Admr., 90 Ky. 560; 14 S. W. 543. Physical suffering of injured is allowed. Louisville & N. R. Co. v. Smith, 9 Ky. L. Rep. 404; not allowed in Louisville & N. R. Co. v. Graham, 98 Ky. 688; 34 S. W. 229, under Ky. Gen. Stat. ch. 57, sec. 3.

[59] Pub. Stat. ch. 52, sec. 17.

[60] Pub. Stats. sec. 1.

[61] Bowers v. City of Boston and Fegan v. Same, 155 Mass. 344, 349, 350; 29 N. E. 633; 15 L. R. A. 365, per Knowlton, J., a case of an action for personal injuries to plaintiff's intestate and an action to recover for subsequent death.

[62] So under Amd't 1892 but not under Act, 1887, ch. 270. See Clark v. New York, etc., R. Co., 160 Mass.

Again, the burden of proof is upon the plaintiff to show mental suffering as it is not a matter of conjecture. So damages will not be awarded for mental suffering of intestate during his fall of twenty feet from a scaffold to the ground, when he became instantly unconscious and died in thirty-six hours.[63] In Nevada it was declared in an early case that there were two grounds of action, one for the injury to the deceased and one for the injury to the kindred named.[64] So it is decided that the New Hamp-

39. See Ramsdell v. New York & N. E. R. Co., 151 Mass. 245; 23 N. E. 1103; 7 L. R. A. 154, holding that an administrator cannot recover damages for the death in addition to those which accrued to the intestate in his lifetime.

[63] Kennedy v. Standard Sugar R., 125 Mass 90; 28 Am. Rep. 214.

[64] Roach v. Imperial Min. Co. (U. S. C. C. D. Nev.), 7 Fed. 698; 7 Sawy. 224, where Hilyer, D. J., said referring to the statute (Nev. Comp. Laws, p. 39, sec. 115): "Under this statute there are two causes of action—two grounds upon which a recovery can be had: one for the injury to the deceased and one for the injury to the kindred named in the act. In the first case the jury may give such damages, pecuniary and exemplary, as they shall deem fair and just; and in the second may take into consideration the pecuniary injury to the kindred named in the act. The use of the words 'pecuniary and exemplary' in the first clause of the proviso and of the word 'pecuniary' in the last is significant, and shows that the legislature had both causes of action in view, otherwise the last clause would serve no purpose. The statute of Nevada is different from any which has come under my observation in this particular" (case was decided in 1881) "and it is evident that the draughtsman had in his mind certain expressions to be found in some of the cases and intended to meet them by giving a right of action to the personal representative in which the rule of damages should be the same as it would have been if the deceased had lived and brought it, and in addition to permit the jury to consider the pecuniary loss to the kindred. This is further manifest from the fact that if there are none of the kindred named in the act there may still be a recovery . . . Whatever the jury 'may take into consideration' must be stated in the complaint for there cannot properly be any proof or any deliberation by the jury upon a cause of action not pleaded. It is not, however, in my opinion, indispensable to the plaintiff's complaint that it should state as a ground of recovery the pecuniary injury to kindred. The complaint as it stands is sufficient in that it contains in this particular allegations touching the injury to the deceased upon which the plaintiff can recover. But if it is a fact that there are kindred of the degrees named in the act and that they have sustained some pecuniary injury by the death, and if the plaintiff purposes to offer proof of those facts, they must be alleged and that the amount of the recovery might become general assets of the estate does not enable proof to be given of these facts without allegation . . . The action to the kindred is a wholly new and distinct

shire statute[65] permitting a recovery for injuries resulting in death does not create a new right of action, but keeps alive a former one with enlarged and remedial damages, and the right to sue comes to the administrator by survival only, and in this connection the statute provides for the recovery for mental and physical pain suffered by the injured party,[66] and the decisions in that state hold that the loss of time, physical and mental pain and anxiety and distress of mind experienced in view of death by the party injured should be considered.[67] But it is error to submit to the jury the issue of physical suffering as an element of damages in an action for an injury by a locomotive explosion, where it is evident that death ensued immediately and there were no signs of mangling upon the body.[68] Again, in Tennessee the statute expressly provides for a recovery for mental and physical suffering, loss of time, necessary expenses resulting to deceased from the personal injuries and also for damages resulting to the parties for whose use and benefit the action survives from the death consequent upon such injuries.[69] But in Ohio there can

one from that which the injured party would have had and cannot be said in any sense to survive. The English statute upon which the statute now being construed is drawn is 9 and 10 Vict. ch. 93, p. 693, passed in 1846, four years after the Massachusetts statute, and it has been uniformly held that statutes of like character as this created a new right and introduced a new element of damages. The court further declared that Kearney v. Rd. Co., 9 Cush. (Mass.) 108, decided upon a statute passed in 1842 was not an authority in the case before it."

[65] Pub. Stat. 1901, ch. 191, secs. 8–12.

[66] Lyons v. Boston & M. R. Co. (U. S. C. C. D. Vt.), 107 Fed. 386.

[67] Corliss v. Worcester N. & R. Co., 63 N. H. 404; 1 N. E. 163. Under the act of 1879, the damages must be confined to the injuries suffered by decedent before death. Clark v. Manchester, 62 N. H. 577. The damages recoverable are for the injury resulting in death. Clark v. Manchester, 62 N. H. 577; Jewett v. Keene, id. 701.

[68] Hastings Lumber Co. v. Garland (U. S. C. C. A. 1st C.), 115 Fed. 15, under Pub. Stat. N. H. ch. 191, secs. 8, 12, citing and considering numerous cases. No damages are recoverable for personal injury to the intestate nor to his feelings. Sawyer v. Concord R. Co., 58 N. H. 517.

[69] Shannon's Annot. Code, Tenn. 1896, p. 986, sec. 4029 (3134); Western & A. R. Co. v. Roberson (U. S. C. C. A. 6th Cir. E. D. Tenn.), 61 Fed. 592; Collins v. East Tenn. V. & G. R. Co., 9 Heisk. (Tenn.) 841; Nashville & C. R. Co. v. Smith, 6 Heisk. (Tenn.) 174; Nashville & C. R. Co. v. Prince, 2 Heisk. (Tenn.) 580; Illinois Cent. R. Co. v. Crudup, 63 Miss. 291 (under Tenn. Stat.). See Knoxville C. G. & L. R. Co. v. Wyrick, 99 Tenn. 500;

be no recovery for the injury to deceased's business in the absence of a special averment.[70]

§ 871. Mental and physical suffering, loss of society, etc. —The damages recoverable do not include a solatium for bereavement, sorrow, or mental or physical suffering caused to the surviving beneficiaries.[71] And although the daughter sustains a nervous shock by reason of her mother's death by an accident, no recovery can be had for such shock, as the damages would be too problematical,[72] nor may the loss by deprivation of the society of a husband or wife be considered,[73] nor can a father recover damages for the loss of his child's society, nor for the

42 S. W. 434. The damages in an action against a railroad company are to be computed as if deceased had not died. East Tennessee, V. & G. R. Co. v. Toppins, 10 Lea (Tenn.), 58; Louisville & N. R. Co. v. Carley, id. 331.

[70] McClardy v. Chandler (Ohio), 2 Week. L. Gaz. 1.

[71] Killian v. Augusta & K. R. Co., 79 Ga. 234; 4 S. E. 165; Commercial Club v. Hilliker, 20 Ind. App. 239; 50 N. E. 578; Kelley v. Central R. R. Iowa (U. S. C. C. Iowa), 48 Fed. 663; Morris v. Chicago, M. & St. P. R. Co. (U. S. C. C. Iowa), 26 Fed. 22; Cincinnati St. R. Co. v. Altemeier, 60 Ohio St. 10; 41 O. L. J. 245; 53 N. E. 300; 6 Am. Neg. Rep. 179, 182, per Burket, J. ; Lake Shore & M. S. R. Co. v. Ehlert (Ohio), 10 Cir. Dec. 443; 19 Cir. Ct. 177; Steel v. Kurtz, 28 Ohio St. 191; Hall v. Crain (Ohio), 3 West. L. Monthly, 137; Smith v. William Powell Co. (Cin. Super. Ct.), 27 Ohio L. J. 267; Au v. New York, L. E. & W. R. Co. (U. S. C. C. N. D. Ohio), 29 Fed. 72, charge of Hammond, J., to the jury; The Oregon (U. S. D. C. D. Or.), 45 Fed. 62; Comp. Stat. Or. 1887, sec. 371; Holland v. Brown (U. S. D. C. D. Or.), 35 Fed. 43, 48; Ladd v. Foster (U. S. D. C. D. Or.), 31 Fed. 827, 832; Holmes v. Oregon & Cal. R. Co. (U. S. D. C. D. Or.), 5 Fed. 523, under Civ. Code. Or. sec. 367; Carlson v. Oregon Short Line & U. N. R. Co., 21 Or. 450; 28 Pac. 497; Walker v. McNeill, 17 Wash. 582; 50 Pac. 518, citing several cases See Perham v. Portland Gen. Elec. Co., 33 Or. 451; 53 Pac. 14; 40 L. R. A. 799; Garther v. Kansas City, etc., R. Co. (U. S. C. C. W. D. Tenn.), 27 Fed. 544, per the court, citing several cases; Knoxville, C. G. & L. R. Co. v. Wyrick, 99 Tenn. 500; 42 S. W. 434, citing several cases. In Tucker v. Draper (Neb. 1901), 86 N. W. 917; 10 Am. Neg. Rep. 307, 308, the court said: "It is assumed that the society and fellowship of one's children have no pecuniary value. Some courts have so expressed themselves, but we do not find it necessary to discuss that proposition."

[72] Filiatrault v. Canadian Pac. R. Co., Rap. Jud. Quebec, 18 C. S. 491.

[73] Killian v. Augusta & R. R. Co., 77 Ga. 234; 4 S. E. 165; Donaldson v. Mississippi & M. R. Co., 18 Iowa, 280; 87 Am. Dec. 391; Board of Comrs. v. Legg, 93 Ind. 523; 47 Am. Rep. 390.

loss of comfort which he might have derived in bringing up the child to manhood,[74] nor can an administrator who is merely the nominal plaintiff recover for the loss of comforts and protection occasioned by the death of her intestate.[75] And a husband's right of action for the loss of his wife's society is defeated by a recovery by her personal representative in an action for her negligent killing.[76] But it is also decided that the loss to the wife and children by being deprived of the use and comforts of the society of the husband and father and the loss of his experience, knowledge and judgment in managing their affairs may be considered.[77] Again, circumstances affecting the mother in peace of mind and happiness by reason of the death of a minor child cannot be considered,[78] nor in an action against a railroad company can one recover for the loss of his mother's society.[79]

§ 872. Legal and actual relations between deceased and beneficiaries—Support, aid, gifts, etc., dependency.—A legal claim upon decedent is not necessary to a recovery,[80] although it is declared that "the nearness of the relation between the deceased and those for whose benefit the damages are claimed,

[74] Mobile & O. R. Co. v. Watley, 69 Miss. 145; 13 So. 825.

[75] Cerillos Coal R. Co. v. Deseraut, 49 N. M. 49; 49 Pac. 807, citing Southwestern R. Co. v. Paulk, 24 Ga. 366; Grand Trunk R. Co. v. Cummings, 106 U. S. 700; 27 L. Ed. 266; Berns v. Gaston Coal Co., 27 W. Va. 285; 55 Am. Rep. 304, and several other cases, dist'g Scheffer v. Washington City V. M. & G. S. R. Co., 105 U. S. 249; 26 L. Ed. 1070; Milwaukee & St. P. R. Co. v. Kellogg, 94 U. S. 469; 24 L. Ed. 256. See also Davis v. Guarnieri, 45 Ohio St. 470; 15 N. E. 350.

[76] Louisville & N. R. Co. v. McElwain, 98 Ky. 700; 18 Ky. L. Rep. 379; 34 S. W. 236; 3 Am. & Eng. R. Cas. N. S. 309; 34 L. R. A. 788, under Ky. Gen. Stat. ch. 57, sec. 1.

[77] Northern Pac. Co. v. Freeman (U. S. C. C. A. 9th Cir. Wash.), 83 Fed. 82, citing Pennsylvania R. Co. v. Goodman, 62 Pa. St. 329; Cregin v. Brooklyn Crosstown R. Co., 19 Hun (N. Y.), 343, Ross J., dissented. This ruling was, however, qualified by the fact that the charge to the jury containing the above factors was so connected with the remainder of the instruction as to make it clear to the jury that such loss was the material use and comforts akin to other elements, such as the loss of deceased's experience, knowledge, etc. Id.

[78] Ohio & M. R. Co. v. Tindall, 13 Ind. 366; 74 Am. Dec. 259.

[79] Filiatrault v. Canadian Pac. R. Co., Rap. Jud. Quebec, 18 C. S. 491.

[80] Chicago & E. R. Co. v. Branyan (Ind. App.), 37 N. E. 190; Hall v. Crain, 3 West. L. Month. 137.

and the nature and the strength of the obligation of the former to care for the latter are considered in estimating the damages, and the more distant the relation or weaker the obligation the less they should be."[81] So in an action by the father for a minor's killing, the jury should consider the deceased's relationship to the plaintiff,[82] and the fact whether or not the next of kin are persons whom the deceased was under obligation to support may affect the presumption of pecuniary damage and the necessity of showing the same.[83] Thus where the action is brought in behalf of those whom deceased was not legally obligated to support or educate or to contribute thereto, proof thereof must be given upon which a reasonable expectation of the continuance of such aid may be based, as by evidence of deceased's acts, declarations of other relevant circumstances tending to show his intention to support, educate or otherwise contribute to such beneficiaries' aid.[84] It has been declared, however, that although some of the kin of deceased might be dependent and have a pecuniary interest in his life and some not, yet the damages would go to the latter as well.[85] Again, the social and domestic relations of the parties and their kindly demeanor towards each other are proper and relevant facts,[86] and within the same principle, evidence may be given as to the relations between deceased and his family;[87] the relations of deceased to the beneficiaries generally, his disposition and good will towards them as likely to result in gifts or inheritances,[88] and the relation of dependents to deceased, their interest in his earnings, his future and his life, as a source of revenue or pecuniary benefits derived from him.[89] So evidence is admissible

[81] Holmes v. Oregon & Cal. R. Co. (U. S. D. C. D. Or.), 5 Fed. 523, 543, et seq., per Deady, J.

[82] City of Elwood v. Addison (Ind. App. 1901), 59 N. E. 47.

[83] Dunhene v. Ohio L. Ins. & Tr. Co., 1 Disney (Ohio), 257 (but see 7 Ohio St. 336).

[84] Atchison, T. & S. F. R. Co. v. Ryan, 62 Kan. 682; 64 Pac. 603. See sec. 893, herein.

[85] Louisville, E. & St. L. R. Co. v. Clarke, 152 U. S. 220; 14 Sup. Ct. Rep. 579; 38 L. Ed. 422, under Ind. Rev. Stat. sec. 284.

[86] Walker v. McNeill, 17 Wash. 582; 50 Pac. 518.

[87] Union P. R. Co. v. Sternberger, 8 Kan. App. 131; 54 Pac. 1101; 12 Am. & Eng. R. Cas. N. S. 745 under Code, Kan. sec. 418.

[88] Cincinnati St. R. Co. v. Altemeier, 60 Ohio St. 10; 41 O. L. J. 245; 53 N. E. 300; 6 Am. Neg. Rep. 179, 181, per Burket, J.

[89] Au v. New York, L. E. & W. R.

as to the amount of money sent by deceased to his relatives and as to investments in life insurance.[90]

§ 873. Same subject continued.—The facts are relevant as bearing upon the reasonable anticipations of pecuniary benefit that the intestate was an unmarried adult, living away from home, and that she did not provide for her relatives or render them services.[91] Again, loss of means of support is declared to be a pecuniary injury, but that it by no means follows that it is the only pecuniary injury for which a recovery can be had,[92] and it is also said in discussing the admissibility of evidence as to the number of deceased's family, that of course the dependence upon him of the mother and other children as a direct ground for the jury's action upon the matter of damages was wholly inadmissible. The evidence was, however, as appears elsewhere herein, admitted upon other grounds.[93] Demands for the support of the deceased are within the Minnesota statute,[94] and the amount of aid in money or services which the deceased was accustomed to furnish the next of kin may be considered.[95] Again, it is decided that to warrant a recovery at all, it must be proven that in the usual course of events in life the beneficiaries would have received financial aid from the deceased had he lived and the approximate amount of such aid. This may be proven by evidence tending to show that in the lifetime of the deceased he supplied aid, support and financial assistance to the beneficiary, and would likely have continued to do so in the future had she lived. So the support the widow would have been likely to have received from her husband had he not been killed is the proper and controlling element of compensation to be considered. "In case of a widow and children, the natural presumption and, in fact,

Co. (U. S. C. C. N. D. Ohio), 29 Fed. 72, charge of Hammond, J., to the jury; Commercial Club v. Hilliker, 20 Ind. App. 239; 50 N. E. 578.

[90] Spaulding v. Chicago, St. P. & K. C. R. Co., 98 Iowa, 205; 67 N. W. 227.

[91] Diebold v. Sharpe, 19 Ind. App. 474; 49 N. E. 837.

[92] Tucker v. Draper (Neb. 1901), 86 N. W. 917; 10 Am. Neg. Rep. 307, 309, per Sedgwick, C., citing City of Friend v. Burleigh, 53 Neb. 674; 74 N. W. 50.

[93] South Omaha W. Co. v. Vocasek (Neb. 1901), 87 N. W. 536; 3 Am. Neg. Rep. 580, 583, 584, per Hastings, C. See this case under secs. 878, 879, herein.

[94] Gen. Laws, 1891, ch. 123, sec. 1. See sec. 881, herein.

[95] Hutchins v. St. Paul, M. & M. R. Co., 44 Minn. 5; 46 N. W. 79.

duty of the deceased is to support them, and, in the absence of a showing to the contrary, the presumption is that such support would be to the full extent of his ability after supporting himself, and in such cases there is no need of showing the poverty of the widow and children. But in case the widow and children should be wealthy in their own right, and having before the death of the deceased received little, if any, support from him, such facts might well be put in evidence for the purpose of showing that the pecuniary injury was small, and thereby reduce the damages."[96]

§ 874. Same subject continued.—In case of an action by the widow it need not be averred that she was dependent upon him for support, where it is alleged that deceased left a widow and next of kin, and the statutory damages are exclusively for their benefit.[97] But evidence is admissible that deceased's wages were turned over to his wife for the family's maintenance.[98] So the amount which decedent would have been able to contribute to his family's support enters into the measure of damages as a factor,[99] and his ability to care for and protect his wife and children and to educate the latter, are proper elements.[100] The value, however, of prospective gifts or of prospective support cannot be considered where the only proof thereof is that adult sons were given their board.[1] Nor does the fact that children were entirely dependent upon their stepfather entitle them to recover under a statute which only gives an action for damages to a "husband or parent,"[2] although the damages to children when the action survives is to be measured by their reasonable support, according to the parent's condition in life, etc.[3] But the fact that the children are all adults and not dependent upon

[96] Cincinnati St. R. Co. v. Altemeier, 60 Ohio St. 10; 41 O. L. J. 245; 53 N. E. 300; 6 Am. Neg. Rep. 179, 182, per Burket, J.

[97] Bedford Stone Co. v. Hobbs (Ind. App.), 38 N. E. 538; and Rev. Stat. 1894, sec. 285.

[98] Lake Erie & W. R. Co. v. Mugg, 132 Ind. 168; 31 N. E. 564.

[99] Smith v. W. Powell Co. (Cin. Super. Ct.), 27 Ohio L. J. 267.

[100] Northern Pac. Co. v. Freeman (U. S. C. C. A. 9th C. Wash.), 27 C. C. A. 457; 48 U. S. App. 757; 83 Fed. 82.

[1] Baltimore & P. R. Co. v. Golway (D. C. App.), 23 Wash. L. Rep. 308.

[2] Marshall v. Macon, S. D. &. L. Co., 103 Ga. 725; 30 S. E. 571; 41 L. R. A. 211.

[3] David v. Southwestern R. Co., 41 Ga. 223.

their father for maintenance will not cause a verdict to be set aside as excessive.[4]

§ 875. Same subject concluded.—In those cases where the recovery sought is for the wrongful, etc., killing of children, it seems that in Georgia a mother can only recover when the deceased contributed to her support and she was also dependent upon him therefor.[5] And this rule has been applied to a father where the deceased son was serving as a convict in a penitentiary and was not actually contributing to the former's support.[6] But an instruction that the mother must show that her son had contributed to her maintenance does not necessarily negative the proposition that it was also essential to prove that she was dependent upon such son.[7] The mother's partial dependency upon, or the fact that she received support in part from her son's services is, however, sufficient.[8] And a dependency of a mother upon a boy eleven years old exists within the statute where his labor in aiding the father on the farm and the mother in the house was worth six dollars a month, and there was a mutual dependence by the members of the family upon each other's labor for support.[9] Again, in Nebraska,[10] general damages can only be

[4] City of Wabash v. Carver, 129 Ind. 552; 29 N. E. 25; 13 L. R. A. 851; 35 Am. & Eng. Corp. Cas. 556.

[5] Augusta S. R. Co. v. McDade, 105 Ga. 134; 31 S. E. 420; 13 Am. & Eng. R. Cas. N. S. 548, under Ga. Civ. Code, sec. 3828.

[6] Smith v. Hatcher, 102 Ga. 158; 29 S. E. 102. See Frazier v. Georgia R. & Bkg. Co., 96 Ga. 785; 22 S. E. 936, and Augusta Factory v. Davis, 87 Ga. 648; 13 S. E. 577, as to the father's right to recover.

[7] Middle Georgia & A. R. Co. v. Barnett, 104 Ga. 582; 30 S. E. 771; 12 Am. & Eng. R. Cas. N. S. 532; 4 Am. Neg. Rep. 611.

[8] Richmond & D. R. Co. v. Johnston, 89 Ga. 560; 15 S. E. 908; Daniels v. Savannah, F. & W. R. Co. (Ga.), 12 S. E. 365, under Ga. Act. October 27, 1887, amd'g Ga. Co. sec. 2971. Where the mother was partially dependent on her son for her support, $1,876.60 against a railroad receiver was held reasonable. Fink v. Ash, 99 Ga. 106; 24 S. E. 976.

[9] Atlanta & C. Air Line R. Co. v. Gravitt, 93 Ga. 369; 20 S. E. 550; 26 L. R. A. 553. So where the deceased child was fifteen years old and he with other children lived with their father and mother and the proceeds of their labor went into the common stock, all of the family being mutually dependent upon their individual and joint labor, it was held that such deceased minor contributed to his mother's support. It is further decided that

[10] Under Comp. St. 1897, ch. 21.

recovered where there is either a dependency upon deceased for maintenance or a legal obligation to furnish the same, subject, however, to the exception that special damages may be alleged and proved.[11] But under a decision in Colorado, a mother need not have been dependent on decedent in order to recover for her son's killing.[12] In Minnesota, the facts were considered that the son gave his father no pecuniary aid after becoming of age and also that he carried insurance for his mother's benefit which she received after the son's death.[13] And where a deceased adult had resided with and wholly supported his mother for ten years, such facts were considered on review of the case.[14] "It may also be shown that the beneficiary is in such financial circumstances and health as to need the aid of the deceased, coupled with the fact that such aid was to some extent supplied during the life of the deceased and a reasonable expectation, under the circumstances, that such aid would continue in the future. In the case of parents, it may be shown that they were in circumstances and health requiring that the deceased child should aid them by his services, not only during minority, but thereafter. In such cases, the financial circumstances and health of the parents are very important, because a parent in poor circumstances would be likely to be compelled to depend largely upon his minor children for support, while a rich parent would receive no financial aid from his minor children, and on the contrary would find them a financial burden upon his hands. A rich parent whose child is a continued financial expense to him,

it is sufficient to aver that the mother was dependent upon her minor son for support and that she need not allege that he ever worked or earned money or in what manner she was so dependent, nor that she lived apart from her husband, or even that she was a widow. Augusta R. Co. v. Glover, 92 Ga. 132; 18 S. E. 406; 58 Am. & Eng. R. Cas. 269, under Ga. Act, October 27, 1887, giving a mother a right of action for the killing of a son upon whom she is wholly or in part dependent for support. But proof alone of contribution to support is insufficient. Clay v. Central R. Co. 84 Ga. 345; 10 S. E. 967. Examine Augusta R. Co. (Ga.), 18 S. E. 406; 58 Am. & Eng. R. Cas. 269.

[11] Thompson v. Chicago, M. & St. P. R. Co. (Neb.), 104 Fed. 845.

[12] Brennan v. Molly Gibson Min. & M. Co. (U. S. C. C. Colo.), 44 Fed. 795.

[13] Sieber v. Great Northern R. Co., 76 Minn. 269; 79 N. W. 95. $2,500 held not excessive.

[14] St. Louis & S. F. R. Co. v. French, 56 Kan. 584; 44 Pac. 12.

and who has no reason to expect financial aid from such child sustains little, if any, pecuniary injury from its death, beyond the funeral expenses, while a poor parent, and especially if in bad health, might reasonably expect substantial aid from such child, not only during its minority, but for years thereafter."[15] Where, however, the deceased is a young child, the jury may estimate as far as they may, what, had the child lived, would those who sue, its parents or next of kin, have received in money from that child or its earnings, and also the probability that up to the age of fourteen it would have been a burden upon, rather than an aid to, the family.[16] Again, it is held that a sum sufficient to buy an annuity equaling the fair and moderate value of the prospective support which the mother had a reasonable expectation of receiving for her life, constitutes the measure of damages.[17] In other cases, where a recovery is sought for the death of children, the actual relations between the parties and the amount of aid rendered, or the failure to contribute, have either been held material factors, or have been considered by the reviewing courts upon the question of damages awarded.[18]

[15] Cincinnati St. R. Co. v. Altemeier, 60 Ohio St. 10; 41 O. L. J. 245; 53 N. E. 300; 6 Am. Neg. Rep. 179–181, per Burket, J. See secs. 878–897, herein.

[16] Baltimore & O. R. Co. v. Hellenthal (U. S. C. C. A. 6th C. Ohio), 31 C. C. A. 414; 60 U. S. App. 156; 88 Fed. 116; 40 Ohio L. J. 248, a charge to jury held correct.

[17] Bernard v. Grand Trunk R. Co., Rep. Judic. Quebec, 11 C. S. 9.

[18] Adult son was unmarried and lived with his parents and three minor children, and contributed to their support. $5,000 held not excessive. Toledo St. R. Co. v. Mammet, 6 Ohio Cir. Dec. 544; 13 C. C. 591. Deceased minor contributed to his mother's support, but she was precluded a right of action by statute. Hall v. Crain, 3 West. Law Month. 137. So also in Thompson v. Chicago, M. & St. P. R. Co. (Neb.), 104 Fed. 845, adult married son contributed to his mother's support but case was reversed and affirmed upon other grounds. Putnam v. Southern Pac. Co., 21 Or. 230; 27 Pac. 1033; 44 Alb. L. J. 517; 10 Ry. & Corp. L. J. 490. In a Rhode Island case the facts were considered that the deceased, an adult son twenty-two years old, was one of eight children, and did not live with his parents and that they had received almost nothing from him after his majority. Flaherty v. N. Y. N. H. & H. R. Co., 19 R. I. 604; 35 Atl. 308; 36 Atl. 1132; Index S. S. Rescripts, 19. $5,000 held excessive, and $3,500 declared sufficient. It is determined in South Dakota that where the deceased son had attained his majority and was strong, healthy and a good laborer, nevertheless the father could only recover nominal damages, although the son after he became of age still lived with him. Smith v. Chicago, M. & St. P. R. Co. (S. D.), 62 N. W. 967.

§ 876. Statutory dependency—"Dependent"—Support, aid, etc.—A father is not a "dependent" so as to recover damages for the death of a minor where his individual earnings furnish his individual support in accordance with his situation and condition in life, although not sufficient for the needs of those dependent upon him.[19] But a widow may recover, though a nonresident alien, within a statute proving that the next of kin suing for an employee's death must be dependent on the wages of the employee.[20] Again, in an action by the mother of deceased it was said: "Although it does not clearly appear how far, if at all, the plaintiff was dependent upon her son for support, there was evidence that for a long time he had given her all his wages and there was testimony from which the jury might have found that she needed the money to obtain the necessaries of life beyond that which her husband could furnish, and that she was dependent upon her son for support within the meaning of the statute."[21] In another case the action was brought by the mother and next of kin to recover for death without conscious suffering. The plaintiff resided in Ireland. In regard to her dependence on her son, it appeared that she

[19] Georgia R. & Bkg. Co. v. Spinks, 111 Ga. 571; 36 S. E. 855; Civ. Code, sec. 3828. That personal representative cannot sue under Burns' Rev. Stat. 1894, sec. 7473, providing a recovery for dependents. Boyd v. Brazil Block-Coal Co. (Ind. App.), 57 N. E. 732, denying rehearing 50 N. E. 368.

[20] Vetaloro v. Perkins (U. S. C. C. E. D. Mass.), 101 Fed. 393, under Mass. Employer's Liability Act, 1887, ch. 270; Mulhall v. Fallon, 176 Mass. 266; 57 N. E. 386; 79 Am. St. Rep. 309.

[21] Welch v. New York, N. H. & H. R. Co., 176 Mass. 393, 401, per Knowlton, J. The action was to recover for death and for conscious suffering under Act, 1887, ch. 270, as am'd by Stat. 1892, ch. 260. "Plaintiff was the mother of deceased who was about 27 years old; he was unmarried and had always lived with her and always gave her his wages and she spent the money on her family and her house for any purpose that she needed to use it. Her husband earned $1.25 a day which he gave to her and she spent the money so received on the house and the family. Her two daughters earned together from $8.50 to $10.50 a week which was also given to her, and used for the support of the family." By Reporter, id. p. 397. Deceased was a switchman. The court cites McCarthy v. New England Ord. of Prot., 153 Mass. 314; 26 N. E. 866; 25 Am. St. Rep. 637; 11 L. R. A. 144; Daly v. New Jersey Steel & I. Co., 155 Mass. 1, 5; 29 N. E. 507; Houlihan v. Connecticut River R., 164 Mass. 555; 42 N. E. 108.

was very poor and he sent her over money repeatedly and regretted not being able to send her more. The money was received by the father while alive, but the father was a paralytic and died nearly a year before the son. The plaintiff bought food with his money and wished she had more to eat. She was almost entirely dependent upon deceased for two years prior to the latter's death and her evidence to this fact was held admissible. She had also to work hard to earn her support and had a boy who was an invalid, although another son earned 1s., 8d., a day. The court said, "Partial dependence for the necessities of life would be enough, as it is made in terms by the English statute."[22] Again, only a dependence in fact, and not a strictly legal dependence by the next of kin upon the employee is required, nor is it necessary that the action for negligently killing such employee should be brought jointly by all of the next of kin and that they should have been dependent upon him for support, but only such next of kin as were dependent need bring action.[23] A sister is dependent where she is an invalid, unable to work regularly or to earn enough to pay her doctor's bills, and relies upon her brother for, and receives support from, him, and it appears that for several years prior to his negligent, instantaneous killing, he had aided her by an average contribu-

[22] Mulhall v. Fallon, 176 Mass. 266, 276; 57 N. E. 386; 79 Am. St. Rep. 309, per Holmes, C. J., citing English Stat. 60 and 61 Vict. ch. 37, cl. 2; McCarthy v. New Eng. Ord. of Prot., 153 Mass. 314, 318; Simmons v. White Bros. (1899), 1 Q. B. 1005; Atlanta & Charlotte A. L. R. v. Gravitt, 93 Ga. 369, 372. "In Hodnett v. Boston & Alb. R., 156 Mass. 86, there was nothing to show that plaintiff did not support herself by her own earnings," Id, per Holmes, J. "The plaintiff was the daughter of the deceased who lived with her and turned over to her all his wages. The family consisted of her father, herself and two older brothers, one a bricklayer and the other a janitor. She bought the household supplies and provisions and the clothes for herself and her father and did the housework. Her brothers paid their board to her, twenty dollars per month and her father's wages were $9 a week. She used all the money she saw fit, in no way accounting for it to her father and she laid up no money in the bank. This state of things was quite different from that which appeared in Hodnett v. Boston & Alb. R., 156 Mass. 86, and we think that it supports a finding that the plaintiff was in fact dependent upon the earnings of the deceased. See Daly v. New Jersey Steel & Iron Co., 155 Mass. 1, 5." Houlihan v. Conn. Riv. Rd. Co., 164 Mass. 555, 557, per Barker, J.

[23] Daly v. New Jersey Steel & I. Co., 155 Mass. 1; 29 N. E. 507.

tion of from thirty to thirty-five dollars monthly.[24] But where a half-sister sues as next of kin, dependent for support upon an employee negligently killed, the fact that she is such dependent is not proven by evidence that she has two children and has no other means of support than her earnings and has had to support herself since the half-brother's death, that the latter on occasional visits gave her money and nearly every other week sent her money to pay her rent.[25] Again, the jury need not be instructed that a brother and sister of deceased were not legally dependent upon him, where it is not shown in the declaration that they were entitled to his wages as of right.[26]

§ 877. Reasonable expectation of pecuniary benefit—Prospective inheritance.—The reasonable expectation of pecuniary advantage, which those entitled would have had except for the death or negligent killing of the intestate, may properly be considered. This reasonable prospect of pecuniary benefit must, however, depend upon all the circumstances, including the actual or legal relations of the parties and being dependent in some measure upon past acts, gifts, aid rendered, etc., evidencing or fairly supporting such reasonable expectation, although it may rest upon legal or family relations or kinship, but not as a matter of right.[27] Again, in determining the amount to be recov-

[24] Daly v. New Jersey Steel & I. Co., 155 Mass. 1; 29 N. E. 507.

[25] Hodnett v. Boston & A. R. Co., 156 Mass. 86; 30 N. E. 224, under Mass. Stat. 1887, ch. 270, sec. 2.

[26] Freeman v. Illinois Cent. R. Co. (Tenn. 1901), 64 S. W. 1.

[27] Family's reasonable expectations considered. Baltimore & P. R. Co. v. Mackey, 157 U. S. 72; 39 L. Ed. 624; 15 Sup. Ct. Rep. 491 (Dist. Col. under act of congress approved Feb. 17, 1889; 23 Stat. at L. 307, ch. 126). See sec. 872 herein as to support, etc. Deceased child's prospects in life considered. City of Elwood v. Addison (Ind. App. 1901), 59 N. E. 47. Damages should be assessed upon the anticipations of pecuniary benefit which the surviving next of kin had the reasonable ground to indulge where deceased was unmarried, etc. Diebold v. Sharpe, 19 Ind. App. 474; 49 N. E. 837. Reasonable expectation considered. Rafferty v. Buckman, 46 Iowa, 195. Reasonable expectation of the continuance of contributions properly considered. Atchison, T. & S. F. R. Co. v. Ryan, 62 Kan. 682; 64 Pac. 603. See secs. 872–875, herein. Benefits which parents might have expected to receive after child's majority considered. Atchison, T. & S. F. R. Co. v. Cross, 58 Kan. 424; 49 Pac. 599. See Louisville, etc., R. Co. v. Case, 9 Bush (Ky.), 728; Shaber v. St. Paul, M. & M. R. Co., 28 Minn. 103; 9 N. W. 575; City of Vicksburg v. McLain, 67 Miss. 4. So what the

ered, the jury may consider any evidence tending to show such reasonable expectation of pecuniary benefit to the heirs,[28] and a sum sufficient to buy an annuity may be based upon such reasonable expectation of advantage.[29] But the value of prospective gifts by the deceased should not be considered in the absence of evidence thereof,[30] nor should any damages be awarded where there is no evidence of deprivation of pecuniary advantage which collateral kindred had any reasonable ground to anticipate.[31] And in New Brunswick the statute precludes any estimate of pecuniary advantage for a period exceeding ten years.[32] Again, in another case there was evidence that adult sons were given their board, and the jury's attention was directed to the consideration of any prospective support that would have been received but for the negligent death.[33] So the past or probable future pecuniary advantage from the continuance of an adult son's life constitutes elements of damage in Kansas.[34] But

parents would have received had the child lived should be considered, but other factors as to its being a burden until a certain period of life, etc., are also proper. Baltimore & O. R. Co. v. Hellenthal (U. S. C. C. A. 6th C.), 60 U. S. App. 156; 31 C. C. A. 414; 88 Fed. 116, 121; 40 Ohio L. J. 248. As to reasonable expectations of collateral kindred, see Groff v. Cincinnati & I. R. Co., 1 Cin. Sup. Ct. Rep. 264. Reasonable expectation of benefit should be considered. Grotenkemper v. Harris, 25 Ohio St. 510; Davis v. Guarnieri (Ohio), 13 West. 438; 15 N. E. 350. Reasonable expectation of continued aid may be considered and prospect of gifts or inheritances evidenced by past acts, as where deceased had supplied aid, etc., during his lifetime and would have been likely to have continued to do so in the future. Cincinnati St. Ry. Co. v. Altemeier, 60 Ohio St. 10; 41 L. J. 245; 53 N. E. 300; 6 Am. Neg. Rep. 179, 181, per Burket, J. See Louisville, etc., R. Co. v. Stacker, 86 Tenn. 343.

[28] Collins v. Davidson (U. S. C. C. D. Minn.), 19 Fed. 83, 87, quoted in Serensen v. Northern Pac. R. Co. (U. S. C. C. D. Mont.), 45 Fed. 407, 411, per Knowles, J. See also Phelps v. Winona & St. P. R. Co., 37 Minn. 485; 5 Am. St. Rep. 867; 35 N. W. 273. Business and injury thereto and earning capacity enter into the question of reasonable expectation of pecuniary benefit to widow. Clapp v. Minneapolis & St. L. Ry. Co., 36 Minn. 6; 29 N. W. 340.

[29] Bernard v. Grand Trunk R. Co., Rap. Jud. Quebec, 11 C. S. 9.

[30] Baltimore & P. R. Co. v. Golway (D. C. App.), 23 Wash. L. Rep. 308.

[31] Wabash R. Co. v. Cregan (Ind. App. 1899), 54 N. E. 767. See also Cherokee & P. Coal & Min. Co. v. Limb, 47 Kan. 469; 28 Pac. 181.

[32] Consol. St. ch. 86.

[33] Baltimore & P. R. Co. v. Golway (D. C. App.), 23 Wash. L. Rep. 308.

[34] Cherokee & P. Coal & M. Co. v. Limb, 47 Kan. 469; 28 Pac. 181.

prospective inheritance has been excluded as an element of damages in the District of Columbia.[35]

§ 878. Physical and financial condition, age, number of family, etc., of beneficiaries.—In an action for the death of a minor child brought by the father, the condition of plaintiff's family may be considered in the matter of need or of use for the child.[36] So the financial circumstances and health of the parents may be shown.[37] Again, the parents' pecuniary condition may be proven or their increasing needs and life expectancy; also the amount of aid or contributions furnished them, either in money or services.[38] So the facts were in evidence

As to reasonable expectation of prospective gifts as involved in contributions to support in this state, see secs. 872–875, herein. But a charge that the jury are not limited to the actual present loss proven but may compensate for the relative injury with reference to the future and for pecuniary injuries present and prospective, is too indefinite and general. Chicago, etc., R. Co. v. Swett, 45 Ill. 197.

[35] Baltimore & P. R. Co. v. Golway (D. C. App.), 23 Wash. L. Rep. 308. See Lake Erie & W. R. Co. v. Mugg (Ind.), 31 N. E. 564.

[36] City of Elwood v. Addison (Ind. App. 1901), 50 N. E. 47.

[37] Cincinnati St. R. Co. v. Altemeier, 60 Ohio St. 10; 41 O. L. J. 245; 53 N. E. 300; 6 Am. Neg. Rep. 179, 181, per Burket, J. This decision quotes, however, from Illinois C. R. Co. v. Baches, 55 Ill. 381, where it was decided that neither the wealth nor poverty of the beneficiaries can be considered in assessing damages, and that the fact that the widow is deformed and disabled does not in any way increase or diminish the amount of the damages. The principal case cites Little Rock, M. R. & T. Co. v. Leverett, 48 Ark. 333; Cook v. Clay St. Hill R. Co., 69 Cal. 604; Augusta R. R. Co. v. Glover, 92 Ga. 132; 18 S. E. 406; 58 Am. & Eng. R. Cas. 269; City of Chicago v. Powers, 42 Ill. 169; 89 Am. Dec. 418; Union Pac. R. Co. v. Dunden, 37 Kan. 1; 14 Pac. 501; Staal v. Grand Rapids & I. R. Co., 57 Mich. 239; Opsahl v. Judd, 30 Minn. 126; Illinois C. R. Co. v. Crudup, 63 Miss. 291; Haehl v. Wabash R. Co., 119 Mo. 325; 24 S. W. 737; Lockwood v. N. Y. L. E. & W. R. Co., 98 N. Y. 523, aff'g 20 Wkly. Dig. 341; Walls v. Rochester R. Co., 92 Hun (N. Y.), 581; 72 N. Y. St. R. 250; 36 N. Y. Supp. 1102, aff'd 154 N. Y. 771; Pressman v. Mooney, 5 App. Div. (N. Y.) 121; 39 N. Y. Supp. 44; Lustig v. N. Y. L. E. & W. R. Co., 65 Hun (N. Y.), 547; 20 N. Y. Supp. 477; Potter v. Chicago & N. W. R. Co., 21 Wis. 373; 94 Am. Dec. 548; Johnson v. Chicago & N. W. R. Co., 64 Wis. 425; Thoresen v. La Crosse City R. Co., 94 Wis. 129; 68 N. W. 548; Barley v. Chicago & A. R. Co., 4 Biss. (U. S.) 430; Southern Pac. Co. v. Lafferty, 15 U. S. App. 193; 57 Fed. 536; 6 U. S. C. C. A. 474.

[38] Opsahl v. Judd, 30 Minn. 126; Hutchinson v. St. Paul & M. R. Co., 44 Minn. 5; 46 N. W. 79.

that the father was the sole heir of a deceased son six years old, and the former's age and condition, viz, that he was working on a salary.[39] And where a female eight years old was killed, evidence was admitted that her stepfather was a schoolteacher, and also of the amount paid women teachers in the township of deceased's residence, there being a slight probability that deceased would have followed that occupation.[40] So financial condition of the beneficiaries seems to be an important factor under the Kansas decisions, since in a case in that state it appeared that the mother was in comfortable pecuniary circumstances, and that the earnings of her son had not been and were not likely to be of profit to her.[41] And the mother's wealth or means of support may be proven.[42] Nor is it error to charge the jury that they may consider deceased's family, who they are and what they consist of, and from all the facts and circumstances make up their minds as to the loss to the family by the

[39] Gunderson v. Northwestern Elevator Co., 47 Minn. 161; 49 N. W. 694.

[40] Eginoire v. Union Co. (Iowa, 1900), 84 N. W. 758. Evidence is admissible of the pursuits in which the father of deceased was engaged as indicating the general nature of the pursuits in which a deceased minor child would have probably followed. It is not to be understood from this that the deceased would have followed the same identical business that his father did, but that it is likely employments would be of the same general character, and of the same general class as his father's. But such testimony is not very controlling in its character. There are a thousand circumstances which lead children into pursuits widely different from those of their parents. This fact, known to every observant person, should be allowed due weight by the jury in estimating the proper reliance to be placed upon such testimony. Yet experience also teaches that children do very frequently pursue the same general class of business as that of their parents. Walters v. Chicago, Rock Island & P. R. Co., 41 Iowa, 71, 73, per Day, J.

[41] Atchison, T. & S. F. R. Co. v. Brown, 26 Kan. 443. $10,000 held excessive. In another case the facts appeared that the father who survived his minor son had a wife and three children and the amount of the father's earnings was also considered. Union Pac. R. Co. v. Dunden, 37 Kan. 1; 14 Pac. 501. $3,000 held excessive; minor was 11 years, 8 months old. See further Missouri P. R. Co. v. Moffatt, 60 Kan. 113; 55 Pac. 837; 12 Am. & Eng. R. Cas. N. S. 397. As to age, sex, circumstances and condition in life of next of kin and the condition of deceased, see also Cherokee & P. Coal & M. Co. v. Limb, 47 Kan. 469; 28 Pac. 181, where only nominal damages were awarded the father for want of evidence of the pecuniary circumstances of the parents.

[42] Hardy v. Minneapolis & St. L. R. Co. (U. S. C. C. D. Minn.), 36 Fed. 657, 660, per Shiras, J.

death.[43] So the number and ages of the children of deceased may be proven in an action by the widow where she sues as trustee for the children.[44]

§ 879. Same subject continued.—Where it is claimed that deceased at the time of the injury was contributing to the assistance of the next of kin, his father, in the performance of the latter's legal duty of supporting the mother and other children, the fact of the existence of such mother and other children would seem to be entirely admissible, not as a direct ground for the jury's action, but as showing what deceased was doing and likely to do, to make his life pecuniarily valuable to plaintiff. The evidence is admissible, not as establishing directly a greater right to consideration from the jury, but as showing what consideration plaintiff was actually receiving and likely to receive in the future from this son.[45] And in an action by the repre-

[43] Baltimore & P. R. Co. v. Mackey, 157 U. S. 72; 39 L. Ed. 624; 15 Sup. Ct. Rep. 491 (D. C.), under U. S. Stat. Feb. 17, 1889; 23 Stat. at L. 307, ch. 126; Mackey v. Baltimore & P. R. Co. (D. C.), 18 Wash. L. Rep. 767.

[44] "It is certainly true that as a general proposition of law such evidence would not be relevant as the right of action given in cases like this for the death of a person is under the statute (Mill & V. Code, sec. 3130), 'for the benefit of his widow or next of kin free from the claims of creditors', and as by the act of 1883, ch. 186 (Code, sec. 3134), damages are also given to the parties for whose benefit the right of action survives from death consequent upon an injury, it seemed to me that this evidence was competent under the authority of (Baltimore & P.) Railroad Co. v. Mackey, 157 U. S. 93; 15 Sup. Ct. 491;" Spiro v. Felton (U. S. C. C. E. D. Tenn.), 73 Fed. 91, per Clark, Dist. J.; Felton v. Spiro (U. S. C. C. A. 6th C. E. D. Tenn.), 24 C. C. A. 321; 47 U. S. App. 102; 78 Fed. 576; 2 Am. Neg. Rep. 682; Illinois Cent. R. Co. v. Davis, 104 Tenn. 442; 58 S. W. 296.

[45] South Omaha W. Co. v. Vocasek (Neb. 1901), 87 N. W. 536; 3 Am. Neg. Rep. 580, 583, 584, per Hastings, C., who said the third error, of course, has to do only with the amount of damages, and not with the right of recovery. The jury assessed the full amount of damages allowed by the statute, and it is claimed that the trial court should not have permitted testimony that plaintiff had a wife, the mother of Robert, and other children, his brothers and sisters. Defendant claims that these facts appear in other parts of the record without objection, and, if their appearance at the place complained of is error, it is without prejudice. Of course the establishment of the plaintiff, or the dependence upon him of the mother and other children, as a direct ground for the jury's action upon the matter of damages, is wholly inadmissible. The cases cited by plaintiff in error

sentative of a deceased husband against a railway company, brought for the benefit of the widow and children, evidence is admissible as to the latter's condition, and as to one of them being an invalid and needing care.[46] But opposed to these decisions it is decided that an administrator cannot show that a widow and several children survived, and that the widower's income was insufficient for her support.[47] Again, a father's physical disability to labor may be shown in an action by the mother for a minor son's negligent killing.[48] And a son's dying declaration as to his mother's poverty in an action against an employer is admissible.[49] So a surviving half-sister's necessitous condition in an action for an employee's death may properly be shown.[50] And a surviving mother's age may be inferred from the circumstances when not proven directly.[51] But it cannot be shown in case of a convict's death that his family was more prosperous after his killing than before,[52] nor that the deceased left no estate or property,[53] nor can the value of a farm in which deceased was a cotenant be shown,[54] nor that all that

seem, so far as we have examined them, to be of that nature. Such is Judge Cooley's line of argument in Railway Co. v. Bayfield, 37 Mich. 205. The court then continues as set out in the above text.

[46] Hunt v. Connor (Ind. App. 1901), 59 N. E. 50, under Employer's Liability Act. Burns' Rev. Stat. 1894, sec. 7085; Horner's Rev. Stat. 1897, sec. 5206. See also Louisville, N. A. & C. R. Co. v. Rush, 127 Ind. 545; 26 N. E. 1010.

[47] Southern R. Co. v. Evans, 23 Ky. L. Rep. 568; 63 S. W. 445. See also Louisville & N. R. Co. v. Taafe, 21 Ky. L. Rep. 64; 50 S. W. 850; 15 Am. & Eng. R. Cas. N. S. 693; Chesapeake & O. R. Co. v. Reeves, 11 Ky. L. Rep. 14; 14 S. W. 464. This case holds that the number and character of the family left is not competent in an action for negligent death. Contra as to ages and number of children. Louisville, C. & L. R. Co. v. Mahoney, 7 Bush (Ky.), 235.

[48] Augusta R. Co. v. Glover, 92 Ga. 132; 18 S. E. 406; 58 Am. & Eng. R. Cas. 269.

[49] Mulhall v. Fallon, 176 Mass. 266; 57 N. E. 386, under Stat. 1898, ch. 505, as to declarations of deceased persons.

[50] Hodnett v. Boston & A. R. Co., 156 Mass. 86; 30 N. E. 224, under Mass. Stat. 1887, ch. 270, sec. 2. But see Shaw v. Boston, etc., R. Co., 8 Gray (Mass.), 45.

[51] Holmes v. Oregon & C. R. Co. (U. S. D. C. Or.), 5 Fed. 523, under sec. 367, Code.

[52] Boswell v. Barnhart, 96 Ga. 521; 23 S. E. 414.

[53] Brunswick & W. R. Co. v. Wiggins, 113 Ga. 842; 39 S. E. 551. See sec. 880, herein.

[54] Dalton v. Chicago, R. I. & P. R. Co., 104 Iowa, 26; 73 N. W. 349. See McKelvy v. Burlington, C. R. & N. R. Co., 94 Iowa, 668; 63 N. W. 608, revg. 58 N. W. 1068; holding that exclusion of such evidence if error

he left was household furniture and similar things.[55] So evidence of the poverty of the widow and children is irrelevant.[56] It is apparent, therefore, from the preceding decisions, that the question of admissibility or rejection of evidence of the character under consideration must depend upon the nature and terms of the statute and the intent thereof, and also upon the class of persons entitled to the benefit of the statute, and while such evidence may not be admissible or relevant as bearing directly upon the damages, still it may in certain cases or under certain circumstances be admissible, as showing or tending to show the existence or nonexistence of certain other relevant or material facts, or to explain or show or as tending to show the admissibility of other relevant and material evidence.

§ 880. Deceased's condition in life—Savings—Probable accumulations.—Deceased's station in life and means and manner of living were evidently important elements under the earlier statutes of Georgia,[57] as where children were beneficiaries, such condition in life of the parents or father would affect the question of the present worth of their reasonable support.[58] So the amount of deceased's property or the amount which would probably have been saved to decedent's estate if he had lived, taking into consideration his age, etc., measure the damages recoverable.[59] And decedent's pecuniary circumstances constitute an element in arriving at the reasonable expectation of pecuniary benefit to the heirs.[60] So intestate's condition in life may be proven.[61] Again, his probable accumulations, had he lived, enters as a factor into the determination of

was without prejudice in view of other evidence.

[55] Fish v. Illinois C. R. Co., 96 Iowa, 702; 65 N. W. 995.

[56] Lake Shore & M. S. R. Co. v. Reynolds, 21 Ohio Cir. Ct. Rep. 402; 21 Ohio C. D. 701, under Rev. Stat. secs. 6134, 6135. See also Savannah R. Co. v. Flannagan, 82 Ga. 579; 9 S. E. 471; Central R. Co. v. Rouse, 77 Ga. 393; 3 S. E. 307.

[57] Augusta & K. R. Co. v. Killian, 79 Ga. 234; 4 S. E. 165.

[58] David v. Southwestern R. Co., 41 Ga. 223.

[59] Kelley v. Central R. of Iowa (U. S. C. C. Iowa), 48 Fed. 663.

[60] Collins v. Davidson (U. S. C. C. D. Minn.), 19 Fed. 83, quoted in Serensen v. Northern Pac. R. Co. (U. S. C. C. D. Mont.), 45 Fed. 407, 411, per Knowles, J.

[61] Missouri P. R. Co. v. Moffatt, 60 Kan. 113; 55 Pac. 837; 12 Am. & Eng. R. Cas. N. S. 397.

the amount recoverable.[62] And evidence is admissible tending to show the amount of property owned by deceased when he came into the state several years before his death, what he had accumulated and what he was worth when he died, since such testimony affects the question of deprivation of pecuniary advantage by the death.[63] So within the same general line of proof, and therefore relevant to be considered is deceased's disposition and capacity to make and save money and acquire property.[64] But in a Federal decision upon the question whether or not the verdict was excessive, the fact that deceased, a young man, had accumulated no property, did not operate to reduce the damages awarded in view of the other circumstances, such as intestate's industry, etc.[65] On the other hand, much stress has been placed by the court upon the fact that deceased's "means of making money were both limited and precarious and that he had little, if any, faculty and disposition to save and accumulate," and that he "had gone backward rather than forward pecuniarily."[66] Again, the fact that deceased left property of but little value is decided to be admissible,[67] and questions directed to the extent of deceased's farm may become relevant,[68] but it may not be shown what was the value of a farm of which the decedent was a cotenant, such evidence being immaterial.[69] No

[62] Lake Erie & W. R. Co. v. Mugg, 132 Ind. 168; 31 N. E. 564; Morris v. Chicago, M. & St. P. R. Co. (U. S. C. C. N. D. Iowa), 26 Fed. 23, where it was charged that the jury were to determine what sum should be awarded as fairly representing the pecuniary loss to the estate, in that said estate has been deprived by the death of the accumulations or net earnings, after allowing all the expenses which said deceased might have accumulated. See McKelvey v. Burlington, C. R. & N. R. Co. 94 Iowa, 668; 63 N. W. 608; rev'g 58 N. W. 1068; Nashville, etc., R. Co. v. Prince, 2 Heisk. (Tenn.) 580. See Andrews v. Chicago, M. & St. P. R. Co., 86 Iowa, 677; 53 N. W. 399; 12 Ry. & Corp. L. J. 296; 52 Am. & Eng. R. Cas. 252; Opsahl v. Judd, 30 Minn. 126; Shaber v. St. Paul, M. & M. R. Co., 28 Minn. 103; 9 N. W. 575.

[63] Phelps v. Winona & St. P. R. Co., 37 Minn. 485; 35 N. W. 273; 5 Am. St. Rep. 867.

[64] Holland v. Brown (U. S. C. C. D. Or.), 35 Fed. 43, 48, under Comp. Stat. 1887, sec. 371.

[65] Sieber v. Great Northern R. Co., 76 Minn. 269; 79 N. W. 95.

[66] See opinion under sec. 868, herein.

[67] Fish v. Illinois C. R. Co., 96 Iowa, 702; 65 N. W. 995.

[68] McKelvey v. Burlington, C. R. & N. R. Co. 94 Iowa, 668; 63 N. W. 608; rev'g 58 N. W. 1068.

[69] Dalton v. Chicago, R. I. & P. R. Co., 104 Iowa, 26; 73 N. W. 349.

presumption, however, favors a deceased minor's providence or diligence in the acquisition of property.[70]

§ 881. Expenses of funeral, medical attendance, etc.—Loss of time.—Expenses of burial are recoverable in some states,[71] as are also medical expenses and nursing, etc., consequent upon the injury.[72] In an action, however, by the father as administrator, nursing and medical expenses for the child are not recoverable, although funeral expenses will be allowed, although where the father sues for himself such expenses are proper elements of damages.[73] But in Georgia the expenses of death and burial must have been such as were reasonably and necessarily incurred.[74] In Oregon, however, it is decided that these expenses are not recoverable, since the action is for the death only. The basis of computation of damages is the death and its consequences and not its antecedents or cause, even though the recovery is assets of the estate which is injured or diminished by these expenses, and the damages must first be applied to the payment of creditors of the estate.[75] And in a Kansas case the petition averred that deceased had been injured from failure to keep the streets in repair, and that she had been put to considerable expense for medical attendance,

[70] Andrews v. Chicago, M. & St. P. R. Co., 86 Iowa, 677; 53 N. W. 399; 12 Ry. & Corp. L. J. 296; 52 Am. & Eng. R. Cas. 252.

[71] Ft. Wayne, C. & L. R. Co. v. Byerle, 110 Ind. 100; 11 N. E. 6; 8 West. 549. But see instruction contra, upon this point held not erroneous in Malott v. Shimer, 153 Ind. 35; 1 Repr. 1234; 54 N. E. 101; Pennsylvania R. Co. v. Lilly, 73 Ind. 252; Stats. Minn. 1894, sec. 5913. But under this statute in order to recover funeral expenses the amount, etc., must be averred. Sykora v. J. I. Case Threshing M. Co. (Minn.), 60 N. W. 1008.

[72] Pennsylvania R. Co. v. Lilly, 73 Ind. 252; Muldowney v. Illinois Cent. R. Co., 36 Iowa, 462; Covington St. R. Co. v. Packer, 9 Bush (Ky.), 455; 15 Am. Rep. 725; Natchez, J. & C. R. Co. v. Cook, 63 Miss. 38; Corliss v. Worcester, N. & R. Co., 63 N. H. 404; 1 N. E. 163; Shannon's Annot. Tenn. Code, 1896, sec. 4029 (3134); Mill & V. Code, Tenn. sec. 3134.

[73] Bunyea v. Metropolitan R. Co., 19 D. C. 76.

[74] Southern R. Co. v. Covenia, 100 Ga. 46; 29 S. E. 219; 40 L. R. A. 253; 62 Am. St. Rep. 312; 10 Am. & Eng. R. Cas. N. S. 551; Augusta Factory v. Davis, 87 Ga. 648; 13 S. E. 577.

[75] Holland v. Brown (U. S. D. C. D. Or.), 35 Fed. 43, 49, 50. The items here were 56 days in hospital with day and night nurse and shroud and liquor, $168; undertaker, $94.50; grave, $15; priest and choir, $25; physician, $325,—total, $670.

etc., and that she remained disabled and injured up to the time of her death, which was the result of the accident, but the administrator having been appointed in another state, a demurrer to the petition was sustained.[76] Again, in some jurisdictions there may be a recovery for loss of time.[77] So testimony may be given as to the expenses of the family during the time.[78]

§ 882. Same subject continued.—Additional expenses incurred during the lifetime of an injured person who subsequently dies, or occasioned thereby to her estate after her death, are elements of damages.[79] And in Massachusetts it is declared that even if the intestate became instantly insensible and so remained until his death, so that nothing could be recovered for any physical or mental suffering, yet the plaintiff might be able to show substantial damages in the expenses and loss incurred before death by reason of the accident.[80] The Minnesota statute[81] provides, "that any demand for the support of the deceased and funeral expenses duly allowed by the probate court shall be first deducted and paid" out of the damages recovered for a wrongful killing, and it is decided that the terms of said enactment do not extend to demands for the support of the family, nor to all debts incurred by deceased for that purpose, and for the support of himself. Only such demands are included as accrued in consequence of, or at any rate after the injury causing the death are payable out of the recovery.[82] But such sums and the

[76] Hurlburt v. Topeka (U. S. C. C. D. Kan.), 34 Fed. 510.

[77] Shannon's Annot. Code, Tenn. 1896, sec. 4029 (3134); Mill & V. Code, Tenn. sec. 3134; Southern R. Co. v. Covenia, 100 Ga. 46; 29 S. E. 219; 40 L. R. A. 253; 62 Am. St. Rep. 312; 10 Am. & Eng. R. Cas. N. S. 551. A case of recovery for child's death. Corliss v. Worcester, N. & R. Co., 63 N. H. 404; 1 N. E. 163.

[78] Hudson v. Houser, 123 Ind. 309; 24 N. E. 243.

[79] Emery v. Boston & M. R. Co., 67 N. H. 434; 36 Atl. 367; Pub. Stat. N. H. 1901, p. 629, sec. 12. Pub. Stat. 1891, ch. 191, sec. 12, provides for reasonable expenses occasioned to the estate by the injury. Necessary expenses resulting to deceased from the personal injuries are recoverable. Shannon's Annot. Code, Tenn. 1896, sec. 4029 (3134); Mill & V. Code, Tenn. sec. 3134.

[80] Kennedy v. Standard Sugar R., 125 Mass. 90; 28 Am. Rep. 214, per Morton, J., citing Bancroft v. Worcester R., 11 Allen (Mass.), 34.

[81] Gen. Laws, 1891, ch. 123, sec. 1.

[82] State v. Probate Court of S. Dak. Co., 51 Minn. 241; 53 N. W. 463, 464, per Gilfillan, C. J. Includes expenses of last sickness. Sykora v. J. I. Case Threshing M. Co., 59 Minn. 130; 60 N. W. 1008, 1009, per Mitchell, J.

amount thereof should be shown in the complaint and the jury may include them in the verdict, and then out of the amount recovered by the beneficiaries, the administrator must first pay the demands allowed by the probate court.[83] So in Rhode Island, the statute excludes expense incurred by the injured person,[84] although in Kentucky, the amount recovered is subject to deduction of funeral expenses and the cost of administration, and such costs about recovery, including attorney's fees, as are not included in the recovery from defendant.[85] Again, the expense of medical attendance is included among the items to be deducted in ascertaining the net recovery for a minor child's death.[86] Under a decision, however, in the Canadian reports for Quebec, children cannot recover for funeral expenses and mourning, since the succession is presumed not to be burdensome but profitable, and such expenses are within the inherent debts thereof.[87]

§ 883. Life expectancy—Mortality tables.—As elsewhere stated life expectancy is a material and important element to be considered.[88] But in determining the expectancy of life, while standard tables are generally resorted to, still this is not necessary nor are they conclusive, nor are they exclusive of other factors or evidence, and the jury need not, therefore, rely alone upon such tables and undoubtedly expert evidence would

[83] Sykora v. J. I. Case Threshing M. Co., 59 Minn. 130; 60 N. W. 1008, 1009, per Mitchell, J. In New Brunswick "any expenses incurred or pecuniary loss sustained prior to his death by the person injured, and in consequence of such injury, and which would have been recoverable as damages by the person injured, if death had not ensued, may also be recovered in the action, and such amounts are assets of the estate." Consol. St. ch. 86.

[84] Lubrano v. Atlantic Mills, 19 R. I. 129; 32 Atl. 205; 34 L. R. A. 797.

[85] Carroll's Ky. Stat. 1899, sec. 6, p. 180; Act, July 3, 1893, ch. 1.

[86] City of Elwood v. Addison (Ind. App. 1901), 59 N. E. 47.

[87] Filiatrault v. Canadian P. R. Co., Rap. Jud. Quebec, 18 C. S. 491.

[88] See sec. 859, herein, and note. See Augusta R. Co. v. Glover, 92 Ga. 706; 18 S. E. 406; 58 Am. & Eng. R. Cas. 269; David v. Southwestern R. Co., 41 Ga. 223; Louisville, E. & St. L. R. Co. v. Clarke, 152 U. S. 220; 14 Sup. Ct. Rep. 579; 38 L. Ed. 422; Ind. Rev. Stat. sec. 284; Kelley v. Central R. of Iowa (U. S. C. C. Iowa), 48 Fed. 663; Louisville & N. R. Co. v. Shumaker (Ky. 1899), 53 S. W. 12; Louisville & N. R. Co. v. Kelly, 100 Ky. 421; 19 Ky. L. Rep. 78; 40 S. W. 452; Chesapeake & A. R. Co. v. Lang, 100 Ky. 221; 19 Ky. L. Rep. 67; 40 S. W. 451; Louisville & N. R. Co. v. Berry, 16 Ky. L. Rep. 722; 29 S. W. 449.

be admissible to show such probable duration of life.[89] So tables of mortality may be used in evidence even though the occupation of deceased was hazardous, due allowance being made for the extra hazard to the life.[90] In case of a minor his probable duration of life should be based upon his actual age at death and not an assumed age of majority.[91]

§ 884. Nominal damages.—It has been declared that to re-

[89] Inaccurate instructions as to annuity tables do not necessarily require a reversal. Georgia R. & Bkg. Co. v. Flowers, 108 Ga. 795; 33 S. E. 874. Jury need not resort to mortality tables. Boswell v. Barnhardt, 96 Ga. 521; 23 S. E. 414. As to computing interest under annuity tables, see Western & A. R. Co. v. Bussey, 95 Ga. 584; 23 S. E. 207. Jury not confined to annuity tables. Central R. Co. v. Thompson, 76 Ga. 770. Carlisle tables are admissible but not conclusive. Central R. Co. v. Crosby, 74 Ga. 737. May be proved by mortuary tables. David v. Southwestern R. Co., 41 Ga. 223. Life tables are admissible not to fix the life expectancy, but to be considered with other relevant evidence. Smiser v. State, 17 Ind. App. 519; 47 N. E. 229. Mortality table shown to be a standard table used by insurance companies is admissible. Kreuger v. Sylvester, 100 Iowa, 647; 69 N. W. 1059. Need not charge jury that Carlisle tables do not prove that deceased would live the time therein specified, but was liable to die at any time. Andrews v. Chicago, M. & St. P. R. Co. (Iowa), 53 N. W. 399; 12 Ry. & Corp. L. J. 296; 52 Am. & Eng. R. Cas. 252. Tables in Johnson's New Universal Encyclopædia are admissible without further proof. Seagel v. Chicago, M. & St. P. R. Co. (Iowa), 49 N. W. 990. American mortality tables are competent. Chicago, R. I. & P. R. Co. v. Martin, 59 Kan. 437. 53 Pac. 461; 4 Am. Neg. Rep. 266; 12 Am. & Eng. R. Cas. N. S. 4. Standard life tables are admissible, but not statements of witness whose only knowledge is gained therefrom; Erb v. Popritz, 59 Kan. 264; 52 Pac. 871. Mortality tables are competent but not indispensable, and jury may make estimate from other factors in evidence. Atchison, T. & S. F. R. Co. v. Hughes, 55 Kan. 491; 40 Pac. 919. Wigglesworth's life tables are admissible. Louisville & N. R. Co. v. Kelley, 100 Ky. 421; 19 Ky. L. Rep. 69; 38 S. W. 852; 7 Am. & Eng. R. Cas. N. S. 165, rehearing denied 19 Ky. L. Rep. 78; 40 S. W. 452. Mortality tables are not conclusive. Lake Shore & M. S. R. Co. v. Schultz, 9 Ohio Cir. Dec. 816; 19 C. C. 639. Expectation of life was proved by testimony of an expert. The Oregon (U. S. D. C. D. Or.), 45 Fed. 62. Standard life tables were used. Holmes v. Oregon & Cal. R. Co. (U. S. D. C. D. Or.), 5 Fed. 523, 543, 544. Carlisle tables are competent. Sweet v. Providence & S. R. Co., 20 R. I. 785; 40 Atl. 237.

[90] Farmers' Loan & T. Co. v. Toledo, A. A. & N. M. R. Co. (U. S. C. C. N. D. Ohio W. D.), 67 Fed. 73; 2 Ohio Leg. News, 184, 305; 1 Wayne Co. Leg. News, No. 47, 5, per Ricks, Dist. J.

[91] Wheelan v. Chicago, M. & St. R. R. R. Co. (Iowa), 52 N. W. 119; 49 Am. & Eng. R. Cas. 693.

quire proof of actual and direct injury to entitle to more than nominal damages would defeat the statutory right,[92] and it is also decided that[93] an action can be maintained by the administrator even though no widow or children are left, and although no special circumstances of pecuniary injury are alleged,[94] and nominal damages can be recovered even though no actual damages are proven.[95] But in another case it is decided that while pecuniary damage is presumed in case of a widow and children who are next of kin, yet special damage must be shown where a collateral kindred or others seek recovery.[96] So it is held that in case of the death of an exceptionally bright female child eight years old, the court could properly refuse an instruction limiting the recovery to nominal damages,[97] nor is the recovery limited to such damages in case of a son who has nearly attained majority.[98] And if one is killed through negligent management of a train, the amount of compensation is not restricted to nominal damages,[99] but it is otherwise decided where deceased was an adult son and there was no evidence of pecuniary advantage lost by said death,[100] Another phase of this question appears in a Tennessee decision where no recovery other than for nominal damages was permitted a father against one who had killed his son, since the latter was stronger than the one who killed him and the son had also begun the assault.[1] In a South Dakota decision where a son had attained majority, only nominal damages were allowed, although he was strong, healthy and a good laborer.[2] Again, only such damages can be recovered by brothers and sisters of deceased, where his habits were bad and

[92] Grotenkemper v. Harris, 25 Ohio St. 510, 514.

[93] Under the act of Ohio, March 25, 1851.

[94] Lyons v. Clev. & T. R. R. Co., 7 Ohio St. 336.

[95] Atchison, T. & S. F. R. Co. v. Weber, 33 Kan. 543; 6 Pac. 877; 52 Am. Rep. 543; Hull v. Crain, 2 Ohio Dec. 453; 3 West. L. Month. 137.

[96] Dunhene v. Ohio L. Ins. & Tr. Co., 1 Disney (Ohio), 257.

[97] Eginoire v. Union Co. (Iowa, 1900), 84 N. W. 758.

[98] Robel v. Chicago, M. & St. P. R. Co., 35 Minn. 84.

[99] Corliss v. Worcester, N. & R. Co., 63 N. H. 404.

[100] Cherokee & P. Coal & Min. Co. v. Limb, 47 Kan. 469; 28 Pac. 181.

[1] Jenkins v. Hankins, 98 Tenn. 545; 41 S. W. 1028. It seems that although the son was retreating at the time, the slayer thought that it was only to better prepare for a continuation of the trouble.

[2] Smith v. Chicago, M. & St. P. R. Co. (S. D.), 62 N. W. 967.

he never saved anything nor contributed to their support.[3] In Washington, a judgment may be rendered for damages for the death of an infant, even though no special pecuniary loss is proven.[4]

§ 885. Death of husband—Husband and father.—In case of the death of a husband or of a husband and father, there are many elements or factors which should be considered in determining the amount of damages to be awarded. These have for the greater part been discussed under other sections and will not be repeated here. They will be found chiefly under those headings in this chapter which relate to the general elements of damage;[5] pecuniary loss;[6] mental suffering and loss of society;[7] the relationship, legal and actual, of deceased to the beneficiary;[8] the reasonable expectation of pecuniary benefit;[9] support and dependency;[10] the physical and financial condition of the beneficiaries, age and number of members of the family;[11] probable accumulations;[12] expenses of sickness, funeral, etc.;[13] marriage and remarriage;[14] insurance, etc.[15] In Georgia, since the amendment by the act of 1887, the full value of the life of deceased as shown by the evidence may be given without any deduction for necessary or other personal expenses of deceased had he lived,[16] and this measure of damages may be awarded even though the wife and husband had been living in a state of separation.[17] Again, if the complaint alleges that a widow and

[3] Anderson v. Chicago, B. & Q. R. Co., 35 Neb. 95; 52 N. W. 840.

[4] So held in Atrops v. Costello, 8 Wash. 149; 35 Pac. 620, under Code Proc. sec. 139.

[5] See secs. 859–868, herein.

[6] See secs. 854, 855, herein.

[7] See sec. 871, herein.

[8] See secs. 872–876, herein.

[9] See sec. 877, herein.

[10] See secs. 872–876, herein.

[11] See secs. 878, 879, herein.

[12] See sec. 880, herein.

[13] See sec. 881, herein.

[14] See sec. 898, herein.

[15] See sec. 897, herein.

[16] 2 Ga. Code (Civil), 1895, sec. 3829. See as to homicide of husband and elements of damages, Brunswick & W. R. Co. v. Wiggins, 113 Ga. 842; 39 S. E. 551; Boswell v. Barnhart, 96 Ga. 521; 23 S. E. 414; Western & A. R. Co. v. Moore, 94 Ga. 457; 20 S. E. 040; Savannah, etc., R. Co. v. Flannagan, 82 Ga. 579; 9 S. E. 471; Central R. & Bkg. Co. v. Rouse, 80 Ga. 442; 5 S. E. 627; Central R. Co. v. Rouse, 77 Ga. 393; 3 S. E. 307; Central R. Co. v. Thompson, 76 Ga. 770; Augusta & K. R. Co. v. Killian, 79 Ga. 234; 4 S. E. 165; Georgia R. & Bkg. Co. v. Garr, 59 Ga. 277; 24 Am. Rep. 492.

[17] Central R. of Ga. v. Bond, 111

infant child survived, actual damages need not be averred, as the legal presumption attaches that the deceased's services were valuable and that such survivors were entitled thereto.[18]

§ 886. Same subject continued.—In Kentucky, the damages are not such "as will compensate" the widow "for the loss of the life of the intestate," but the proper measure of award is such as will "compensate the estate of the decedent for the destruction of his power to earn money."[19] And it is error to charge the jury in such terms as to hold before them the fact that it is the wife and child who are to be compensated.[20] So an instruction is prejudicial to defendant which directs the jury to find the damages sustained by the "widow and children," not in excess of the amount claimed.[21] It is

Ga. 13; 36 S. E. 299. Wife living separate from her husband and using his wages for her children's support and her own may sue in her own name and in her husband's name for her use. East Tennessee, V. & G. R. Co. v. Maloy, 77 Ga. 237; 2 S. E. 941. Widow is entitled to sue for death of husband employed by railroad company, whether a coemployee or not. Killian v. Augusta & K. R. Co., 78 Ga. 749; 3 S. E. 621.

[18] Chicago & E. R. Co. v. Thomas, 155 Ind. 634; 58 N. E. 1040; 55 N. E. 861. See also Haug v. Great Northern R. Co., 8 N. D. 23; 77 N. W. 97; 42 L. R. A. 664; 12 Am. & Eng. R. Cas. N. S. 25, citing and criticising several cases. But the petition by a widow should, under Kan. Code Civ. sec. 419, set forth the nonappointment of an administrator. Walker v. O'Connell, 59 Kan. 306; 52 Pac. 894. See as to damages in Indiana, in case of death of husband or husband and father, Hunt v. Connor (Ind. App. 1901), 59 N. E. 50, under Employer's Liability Act. Burns' Rev. Stat. 1894, sec. 7085; Horner's Rev. Stat. 1897, sec. 5206t; Malott v. Shimer, 153 Ind. 35; 1 Repr. 1234; 54 N. E. 101; 6 Am. Neg. Rep. 263; 15 Am. & Eng. R. Cas. N. S. 774; Lake Erie & W. R. Co. v. Mugg, 132 Ind. 168; 31 N. E. 564; Board of Comrs. v. Legg, 93 Ind. 523; 47 Am. Rep. 390; Commercial Club v. Hilliker, 20 Ind. App. 239; 50 N. E. 578; Salem Bedford S. Co. v. Hobbs (Ind. App.), 38 N. E. 538.

[19] Southern R. Co. v. Barr (Ky. 1899), 55 S. W. 900.

[20] Louisville & N. R. Co. v. Shumaker (Ky. 1899), 53 S. W. 12, rehearing denied 56 S. W. 155, citing several cases.

[21] Louisville & N. R. Co. v. Eakins, 20 Ky. L. Rep. 736, 933; 47 S. W. 872; 46 S. W. 496; 45 S. W. 529, action was by the administrator in this case. Citing Beems v. Chicago R. I. & P. R. Co., 58 Iowa, 158; Chicago v. O'Brennan, 65 Ill. 163. The widow and child or children of one killed by wilful neglect have the exclusive right to the damages, and the prior right to sue under chap. 57, sec. 3. Henderson v. Kentucky C. R. Co., 86 Ky. 389; 5 S. W. 875. The widow and children may join in the action where death was wantonly and maliciously inflicted.

decided, however, that where the death is occasioned by wilful negligence and there are no children, that the damages belong exclusively to the widow.[22] In Tennessee, the damages inure to the benefit of the widow and children and not to the widow alone, and if she brings the action she sues as trustee for herself and children.[23] Again, the amount received from the labor of a deceased husband and father less his support and personal expenses is the amount of compensation to the widow and children.[24]

McClurg v. Inglehart, 17 Ky. L. Rep. 913; 33 S. W. 80. As to right of widow and minor child or children or either of them to sue, and that the act is constitutional, see McClure v. Alexander, 15 Ky. L. Rep. 732; 24 S. W. 619, under Ky. Gen. Stat. ch. 1, sec. 6, and Ky. Const. sec. 241.

[22] McDonald v. McDonald, 16 Ky. L. Rep. 412; 28 S. W. 482. See also Lima Elec. L. & P. Co. v. Deubler, 7 Ohio C. C. 185, under Ohio Rev. Stat. secs. 6134, 6135.

[23] Felton v. Spiro (U. S. C. C. A. 6th C. E. D. Tenn.), 24 C. C. A. 321; 47 U. S. App. 402; 78 Fed. 576; 2 Am. Neg. Rep. 576, under amd't 1871, to secs. 2291, 2292, Code, Tenn. Widow has the preference to sue, but may waive her right under Mill & V. Code, secs. 3130, 3132. Webb v. East Tenn. V. & G. R. Co., 88 Tenn. 119; 12 S. W. 428; 42 Am. & Eng. R. Cas. 44. In an action for the killing of her husband, brought by the widow against a railroad company, where the children are not named as beneficiaries in the complaint, it is not error to instruct that such pecuniary damages may be recovered as resulted to her and her children. Illinois Cent. R. Co. v. Davis, 104 Tenn. 442; 58 S. W. 296. In Massachusetts, under the Employer's Liability Act, 1887, ch. 270, an alien may sue, and the words of sec. 2, do not restrict the right of any particular person or class of persons to sue. Vetaloro v. Perkins (U. S. C. C. E. D. Mass.), 101 Fed. 393, per Colt, Cir. J. Contra, Deni v. Pennsylvania R. Co., 181 Pa. 525; 3 Am. Neg. Rep. 91. A widow cannot recover under the Mississippi statute for the injury to herself and child in a suit by her as administratrix of her husband's estate. McVey v. Illinois C. R. Co., 73 Miss. 487; 19 So. 209; 3 Am. & Eng. R. Cas. N. S. 371. See further as to actions for widow and children and damages, Farmers' L. & T. Co. v. Toledo, A. A. & N. M. R. Co. (U. S. C. C. N. D. Ohio W. D.), 67 Fed. 73; Cincinnati St. R. Co. v. Altemeier, 60 Ohio St. 10; 41 O. L. J. 245; 53 N. E. 300; 6 Am. Neg. Rep. 179; Au v. New York, L. E. & W. R. Co. (U. S. C. C. N. D. Ohio), 29 Fed. 72; Holmes v. Oregon & Cal. R. Co. (U. S. D. C. D. Or.), 5 Fed. 75, 523; 6 Sawy. 262; Knoxville, C. G. & L. R. Co. v. Wyrick, 99 Tenn. 500; 42 S. W. 434; Walker v. McNeil, 17 Wash. 582; 50 Pac. 518; Northern P. R. Co. v. Freeman (U. S. C. C. A. 9th C. Wash.), 27 C. C. A. 457; 48 U. S. App. 757; 83 Fed. 82.

[24] Durand v. Asbestos & A. Co., Rap. Jud. Quebec, 19 C. S. 39.

§ 887. Death of wife.—In a case in the United States circuit court wherein a wife and others were killed in a collision, the court charged the jury that in an action for the wife's death her age at the time of her death, and any other facts established by the evidence which tended to throw light upon her ability to earn money, might be considered, and the damages fixed at such sum as would fairly represent the pecuniary loss to her estate, but that nothing could be allowed for anguish or suffering caused to the husband.[25]

[25] Morris v. Chicago, M. & St. P. R. Co. (U. S. C. C. N. D. Iowa), 26 Fed. 23, per Shiras, J., charging the jury. See secs. 859–868, 871, herein. Suit by husband cannot be maintained. Womack v. Central & Bkg. Co., 80 Ga. 132; 5 S. E. 63. Under act of congress, Feb. 17, 1885, notwithstanding Md. Act, 1798, a surviving husband cannot sue for the wife's death. Ferguson v. Washington & G. R. Co. (D. C. App.), 23 Wash. L. Rep. 407. Husband is not next of kin, and widower is not the proper party to an action for wife's death, under Kan. Gen. St. sec. 4518. Western Un. Tel. Co. v. McGill (U. S. C. C. A. 8th C., Kan.), 6 C. C. A. 521; 12 U. S. App. 651; 57 Fed. 699; 21 L. R. A. 818, under Gen. Stat. 1889, ¶¶ 4518, 4519. Husband is not next of kin under Minn. Gen. Stat. 1894, sec. 5913, so as to enable him to recover damages for wife's death occasioned by negligence of railroad company. Watson v. St. Paul City R. Co., 70 Minn. 514; 73 N. W. 400; 3 Chic. L. J. Wkly. 71, criticising Steel v. Kurtz, 28 Ohio St. 191; Chattanooga Elec. R. Co. v. Johnson, 97 Tenn. 667; 37 S. W. 558; 34 L. R. A. 442. Husband as such cannot maintain action but must sue as administrator, even though the damages recovered inure to his benefit. Chattanooga Elec. R. Co. v. Johnson, 97 Tenn. 667; 37 S. W. 558; 34 L. R. A. 442, under Mill & V. Code, sec. 3130. Wife's personal representative may sue druggist who careless in mixing prescription taken by wife, resulted in her death. Bream v. Brown, 5 Coldw. (Tenn.) 168. When damages inure to benefit of divorced husband of wife killed in Ohio. Re Degaramo's Estate, 86 Hun (N. Y.), 390; 67 N. Y. St. R. 215; 33 N. Y. Supp. 502. "A petition against a city in Kansas to recover damages for personal injuries resulting to plaintiff's intestate from defendant's failure to keep the streets in repair, set up the fact of the injury that said intestate had been seriously hurt and put to considerable expense for medical attendance, etc., that she remained disabled and enfeebled up to the time of her death, and that her death was the result of the accident. The administrator was appointed in Missouri, and a demurrer to the petition was sustained on the ground among others that under the laws of that state such an action could not be maintained by the personal representative, but should be brought by the distributees as provided by 1 Rev. St. Mo. 1879, sec. 2121. Leave having been given an amended petition was filed, but the only additional matter set out was that the deceased had left a husband and son, naming them, and that they were her next of kin. Held on demurrer that

§ 888. Death of parents.—If the statute only contemplates a right of action in behalf of minor children of a deceased father, those who were adults at the time of death of said parent are not entitled to share in the damages recovered.[26] Nor can damages be allowed for the death of a stepfather where the statute only specifies the "husband or father" as beneficiaries.[27] Nor can minor children recover for a married woman's death, although they are entitled in case of a widow's negligent killing.[28] Nor do damages for such married woman's death include the loss to minor children in an action by the husband.[29] In Kentucky, adult children come within the statutory provision giving a right of action for punitive damages.[30] And the pecuniary value of their father's life in the amount which it would yield during its probable duration is the measure of compensation.[31] But relations of dependency are of weight in estimating the damages or in determining who are dependents within a statute,[32] al-

the additional matter did not change the question, and that the petition should be dismissed. The right of action for injuries resulting in death being vested under 1 Rev. Stat. Mo. 1879, secs. 2121 and 96, solely in the surviving consort, children, etc., an administrator of that state has no standing in the Federal courts sitting in Kansas under Comp. Laws, Kan. 1879, sec. 422, vesting such right of action in the personal representatives to recover damages for the death of his intestate caused there by wrongful act." Syllabus to Hurlburt v. Topeka (U. S. C. C. D. Kan.), 34 Fed. 510.

[26] Coleman v. Heyer, 113 Ga. 420; 38 S. E. 962, under Civ. Code, sec. 3828.

[27] Marshall v. Macon, S. D. L. Co., 103 Ga. 725; 30 S. E. 571; 41 L. R. A. 211. The word "heir" in Comp. Laws. S. D. sec. 5499, means child, and no action can be maintained thereunder to recover damages where deceased left neither widow nor children. Lintz v. Holy Terror Min. Co., 13 S. D. 489; 83 N. W. 570. Damages inure to the benefit of the widow and children and not to the widow alone. Felton v. Spiro (U. S. C. C. A. 6th C. E. D. Tenn.), 24 C. C. A. 321; 47 U. S. App. 402; 78 Fed. 576; 2 Am. Neg. Rep. 682; Code 1858, secs. 2591–2593; Amd't 1871, secs. 2291, 2292. See also id. 78 Fed. 579, per Taft, Cir. J. That illegitimate child can recover for mother's death, see Muhl v. Southern, etc., R. Co., 10 Ohio St. 272.

[28] Scott v. Central R. Co., 77 Ga. 450.

[29] Chattanooga Elec. R. Co. v. Johnson, 97 Tenn. 667; 37 S. W. 558; 34 L. R. A. 442, under Mill & V. Code, sec. 3130.

[30] Pennsylvania Co. v. Malia, 20 Ky. L. Rep. 1623; 49 S. W. 809, under Gen. Stat. ch. 57, sec. 3. See sec. 857, herein.

[31] Louisville & N. R. Co. v. Graham, 98 Ky. 688; 19 Ky. L. Rep. 1229; 34 S. W. 229, based upon Alabama decisions.

[32] See secs. 872–876, herein.

though there can be damages allowed for the loss of a mother's labors.[33] Again, if prospective gifts are relied on as factors, there must be some evidence thereof, at least to adult sons.[34] Other elements of damages applicable to the case of a parent's death are considered herein under the several sections relating to general factors,[35] reasonable expectation of pecuniary benefit,[36] legal and actual relations, support and dependency,[37] pecuniary loss, solatium, loss of society, etc.,[38] the death of a husband and father,[39] physical and financial condition, etc., of beneficiaries,[40] and other sections throughout this chapter.

§ 889. Death of parents—Loss of care, training, advice, etc., to children.—Adult children cannot recover damages for the loss of paternal advice and guidance,[41] although the loss of a parent's care and training are proper elements of compensation.[42] So loss of the deceased's experience, knowledge, judgment and the like are relevant, as are also his ability to train and educate his children,[43] and the father's condition in life is a factor.[44] It is however decided that it is not proper to charge the jury to consider deceased's advice, counsel and control of his children in admeasuring the amount of recovery,[45] and this seems to apply also to culture, moral training, etc., of a mother.[46]

§ 890. Death of children.—In determining the measure of damages for the death of children by wrongful act, negligence, etc., the nature and character of the statutes is most important,

[33] Filiatrault v. Canadian Pac. R. Co., Rap. Jud. Quebec, 18 S. C. 491.

[34] Baltimore & P. R. Co. v. Golway (D. C. App.), 23 Wash. L. Rep. 308. See secs. 872–877, herein.

[35] See secs. 859–868, herein.

[36] See sec. 877, herein.

[37] See secs. 872–876, herein.

[38] See secs. 854, 855, 869–871, herein.

[39] See secs. 885, 886, herein.

[40] See secs. 878, 879, herein.

[41] Baltimore & P. R. Co. v. Golway (D. C. App.), 23 Wash. L. Rep. 308.

[42] Board of Commissioners of Howard v. Legg, 93 Ind. 523; 47 Am. Rep. 590.

[43] Northern P. R. Co. v. Freeman (U. S. C. C. A. 9th C. Wash.), 27 C. C. A. 457; 48 U. S. App. 757; 83 Fed. 82.

[44] David v. Southwestern R. Co., 41 Ga. 223.

[45] Toledo St. R. Co. v. Mammet, 6 Ohio Cir. Dec. 544; 13 C. C. 591. The charge was, however, held to be cured by limiting the recovery to the pecuniary loss.

[46] Davis v. Guarnieri, 45 Ohio St. 470; 15 N. E. 350.

since it is upon these that the right of recovering damages depends.[47] Another factor is that the father is obligated by law for the support and maintenance of his children until they be-

[47] Under Ga. Civ. Code, sec. 3825, and Act, 1889, p. 73, the administrator has not the right of action possessed by his decedent for the homicide of a son. Frazier v. Georgia R. & B. Co., 101 Ga. 77; 28 S. E. 662; 46 Cent. L. J. 133; Rev. St. Idaho, 1887, sec. 4100. "Heirs or personal representatives" was copied from the Code of California after the decision in Taylor v. Railroad, 45 Cal. 323, and the rules of interpretation of statutes justify an inference that the legislature of Idaho intended to adopt the known judicial interpretation of the act as well as the text, and, therefore, the Idaho statute includes as a beneficiary a parent who has suffered an actual pecuniary loss by the death of a son, and a mother who is the sole heir of decedent and entitled to damages for her death may sue in her name. Decedent was an unmarried adult son. Peterman v. Northern P. R. Co. (U. S. C. C. D. Wash.), 105 Fed. 335. A guardian who has paid no expenditures on account of a ward from his property by reason of the accident causing the death of the minor has no right of action where the mother is living. Louisville, N. A. & C. R. Co. v. Goodykoontz (Ind.), 21 N. E. 472, under Ind. Rev. Stat. 1881, sec. 266. Father's right of action for death of infant does not abate by father's death under Ind. Rev. Stat. secs. 266, 282, 283. Pennsylvania Co. v. Davis (Ind. App.), 29 N. E. 425. Parent must prove that personal representative has been appointed. Atchison, T. & S. F. R. Co. v. Judah (Kan. App. 1900), 62 Pac. 711. Father and mother of infant have no right of action, as the statute only applies where death does not result from the injury. Eureka v. Merrifield (Kan.), 37 Pac. 113, under Kan. Civ. Code, sec. 420. Petition need only allege that deceased left plaintiff, administrator, who is his mother, surviving him as next of kin. Missouri P. R. Co. v. Barber, 44 Kan. 612; 24 Pac. 969; 44 Am. & Eng. R. Cas. 523, under Code, sec. 422. As to objection to appointment of administrator that minor left no estate, see Union P. R. Co. v. Dunden, 37 Kan. 1; 14 Pac. 501. Father of minor cannot sue for death by shooting, under Ky. Stat. sec. 4. Harris v. Kentucky Timber & L. Co., 19 Ky. L. Rep. 1731; 43 S. W. 462, denying rehearing 43 S. W. 462, holding also sec. 6 of the statute does not apply in such case. Father and only heir of child cannot recover against a railroad company under ch. 57, sec. 3. Hackett v. Louisville, St. L. & T. P. R. Co., 15 Ky. L. Rep. 612; 24 S. W. 871; Kentucky C. R. Co. v. McGinty, 12 Ky. L. Rep. 482; 14 S. W. 601. "Heir" under said sec. 3, ch. 57, means child and does not include parents. Jordan v. Cincinnati, N. O. & T. P. R. Co., 11 Ky. L. Rep. 204; 11 S. W. 1013. Mother though a nonresident alien may sue. Mulhall v. Fallon, 176 Mass. 266; 57 N. E. 386, under Rev. Stat. Mass. ch. 270, sec. 2. Father cannot recover against employer where latter did not know that deceased was a minor. Cutting v. Seabury, 1 Sprague (Mass. Dist. Ct.), 522. Not father but personal representative must sue under R. I. Pub. Stat. ch. 204, sec. 20. Goodwin v. Nickerson, 17 R. I. —; 23 Atl. 12. See also Holston v. Dayton

come of age and is entitled to their earnings and the benefit of their labor.[48] And emancipation of a minor child may be considered in determining the amount of damages.[49] Although a mother

Coal & I. Co., 95 Tenn. 521; 32 S. W. 486, under Mill & V. Tenn. Code, secs. 3130–3131. Father cannot recover against one killing his son, where the latter was stronger than the one killing him. Jenkins v. Hankins, 98 Tenn. 545; 41 S. W. 1028. See as to mother's right to recover where there are collateral kindred, Freeman v. Illinois C. R. Co. (Tenn. 1091), 64 S. W. 1. As to sufficient averment of minor's age, see Lynn v. Illinois C. R. Co., 63 Miss. 157. That parent cannot sue for death of son who was in railroad company's employ, see Illinois C. R. Co. v. Hunter, 70 Miss. 471; 12 So. 482, under Miss. Const. 1890, sec. 193. Mother alone can be plaintiff under Miss. Code, 1892, sec. 663. Illinois C. R. Co. v. Hunter, 70 Miss. 471; 12 So. 482. "Heirs or personal representatives" include only the widow and children and does not authorize the mother to recover for death of adult son. Nesbitt v. Northern P. R. Co., 22 Wash. 698; 61 Pac. 14, under Hill's Annot. Codes and Stats. sec. 138. Parents are not "heirs" under 2 Hill's Wash. Code, sec. 138. Noble v. Seattle, 19 Wash. 133; 50 Pac. 1013; 40 L. R. A. 133. Mother who is heir may recover damages. Peterman v. Northern P. R. Co. (U. S. C. C. Wash.), 105 Fed. 335. One who marries the mother of a bastard is not a father of the child, and cannot recover for his death. Thornburg v. American S. Co. (Ind.), 40 N. E. 1062, under Ind. Rev. Stat. 1881, sec. 266; Rev. Stat. 1894, sec. 267. Nor under the same statute can the father of an illegitimate child recover. McDonald v. Pittsburg, C. C. & St. L. R. Co., 144 Ind. 459; 43 N. E. 447; 32 L. R. A. 309. See further as to illegitimate children, Citizens Street R. Co. v. Cooper, 22 Ind. App. 459; 1 Repr. 1192; 53 N. E. 1092, holding that mother cannot recover under Ind. Rev. Stat. 1897, sec. 266, citing Marshall v. Wabash R. Co., 120 Mo. 275; 25 S. W. 179; Harkins v. Phila. R. R. Co., 15 Phila. 286. See also Alabama & V. R. Co. v. Williams, 78 Miss. 209; 28 So. 853; 51 L. R. A. 836, under Acts, 1898, p. 83; Marshall v. Wabash R. Co. (U. S. C. C. S. D. Ohio), 46 Fed. 269. As to death of child in ventre sa mere, see Gorman v. Budlong (R. I. 1901), 49 Atl. 704; 10 Am. Neg. Rep. 188, under Gen. Laws, ch. 233, sec. 14, holding that father cannot recover, and to same point, see Allaire v. St. Luke's Hospital (Ill. 1900), 56 N. E. 638; 7 Am. Neg. Rep. 427, Boggs, J., dissenting.

[48] And the proceeds thereof would not belong to their estate and would not pass to their administrator. Morris v. Chicago, M. & St. R. Co. (U. S. C. C. N. D. Iowa), 26 Fed. 23, per Shiras, J., charging the jury. Children were killed, one 3 years old and another about 18 months old.

[49] St. Joseph & W. R. Co. v. Wheeler, 35 Kan. 185; 10 Pac. 461. As to emancipation generally, see Wilson v. McMillan, 62 Ga. 16; 35 Am. Rep. 115; Elwood Elec. St. R. Co. v. Ross (Ind. App. 1900), 58 N. E. 535; Robinson v. Hathaway, 150 Ind. 679; 50 N. E. 883; Berry v. Louisville, E. & St. L. R. Co. (Ind.), 28 N. E. 182; Kubie v. Zenke, 105

may be bound to support her child,[50] and she may also have recourse against her children for entire maintenance.[51] So the statute may compel the children of poor parents to maintain them to the extent of their ability.[52] Where this duty to support the child exists and enters into the estimation of damages, the measure thereof should not, it is decided, be lessened by a set-off of what the child might earn during its minority, even though the right to exact work from such minor lawfully existed.[53] But the ordinary cost of supporting a minor should be deducted from his earnings even though all of said earnings were used by the child for his own purposes, such use not being fixed by any permanent agreement and there being no emancipation.[54] And defendant may show that the actual expense of schooling, clothing, lodging and maintenance exceeded the earnings and so precluded any damages for loss of services.[55] But the aid and support rendered to parents by children and the dependency of the former upon the latter may be considered.[56] The fact that the father is also entitled to the services of his minor child makes the loss thereof the gravamen of the action by him to recover for such child's negligent or wrongful killing, the governing law being, it is decided, that applicable to the relation of master and servant.[57]

Iowa, 269; 74 N. W. 748; Cooper v. McNamara (Iowa), 60 N. W. 522; Commonwealth v. Graham, 157 Mass. 73; 31 N. E. 706; 16 L. R. A. 578; Taunton v. Plymouth, 15 Mass. 203; Dick v. Grissom, Freem. Ch. (Miss.) 428; Aldrich v. Bennett, 63 N. H. 415; 56 Am. Rep. 529; Flynn v. Baisley, 35 Or. 268; 57 Pac. 998; 45 L. R. A. 645. That the obligation to support a daughter does not cease with her marriage when she is in actual need, see Pratt v. Pratt, Rap. Jud. Quebec, 10 C. S. 134. And mere offer of the father to support does not relieve from liability (State v. Sutcliffe, 18 R. I. —; 25 Atl. 654.), even though living under an agreement of separation with his wife. Bowen v. State, 56 Ohio St. 235; 37 Ohio L. J. 278; 46 N. E. 708.

[50] Wing v. Hibbert, 9 Ohio C. P. Dec. 65, citing Dedham v. Natick, 16 Mass. 140.

[51] Bernard v. Grand Trunk R. Co., Rap. Jud. Quebec, 11 C. S. 9.

[52] McCook Co. v. Kammoss, 7 S. D. 558; 64 N. W. 1123; 31 L. R. A. 461.

[53] Atlanta R. Co. v. Venable, 67 Ga. 697.

[54] Hopkinson v. Knapp & S. Co., (Iowa), 60 N. W. 653. See also City of Elwood v. Addison (Ind. App. 1901), 59 N. E. 47.

[55] Atrops v. Costello, 8 Wash. 149; 35 Pac. 620. See as to child's being a burden up to 14 years of age, Baltimore & O. R. Co. v. Hellenthal (U. S. C. C. A. 6th C. Ohio), 31 C. C. A. 414.

[56] See secs. 872 et seq., herein, as to support.

[57] Frazier v. Georgia R. & B. Co., 101 Ga. 70; 28 S. E. 684; 46 Cent. L.

And where the father had deserted his family, holding no communication with them for years and furnishing them no support, and the minor child had lived with his mother, she being dependent upon him for support, it was determined that the father had forfeited his right to his son's earnings and had therefore sustained no pecuniary damage by his death, but that although the mother was entitled to the son's earnings, nevertheless the statute gave her no right to damages for his negligent killing.[58]

§ 891. Same subject continued.—In Georgia it is decided that the question whether or not a very young child was capable of rendering any valuable service to his father should be left to the jury,[59] although in case of a child less than two years old it was determined that it was a matter of common experience that a child of that age could not have sufficient capacity to render services capable of being estimated in money and that the court would take judicial cognizance thereof.[60] And the same rule was applied to a child less than three years old even though the rendering of services was alleged.[61] But where the deceased was not quite five years old, it was held that the lower court erred in not allowing an amendment that the child was old enough to and did render valuable services.[62] In Kentucky,

J. 133, citing Fried v. New York C. R. Co., 25 How. Pr. (N. Y.) 285.

[58] Thompson v. Chicago, M. & St. P. R. Co., 104 Fed. 845, under Neb. Comp. Stat. 1897, ch. 21. Under Ind. Stat. 1881, sec. 266, in case of the father's desertion, the mother may recover for a minor child's death. Louisville, E. & St. L. R. Co. v. Lohges (Ind. App.), 33 N. E. 449; Thornton's Rev. Stat. Ind. 1897, sec. 284. So also in Iowa, Code, 1897, sec. 3471; McClain's Code, sec. 3761. In Oregon, Hill's Annot. Laws, p. 158, sec. 34 (33); and in Washington, Ballinger's Codes and Stats. 1897, sec. 4828.

[59] Crawford v. Southern R. Co., 106 Ga. 870; 33 S. E. 826; 4 Chic. L. J. Wkly. 436; 6 Am. Neg. Rep. 459, where the court, per Fish, J., said. "Because a child is too young to exercise any care for its own safety, we do not think it necessarily follows that it cannot render any service of value to its parents." The child here was 4½ years old.

[60] Southern R. Co. v. Covenia, 100 Ga. 46; 29 S. E. 219; 40 L. R. A. 253; 62 Am. St. Rep. 312; 10 Am. & Eng. R. Cas. N. S. 551. Child was 1 year, 8 months and 10 days old.

[61] Atlanta Consol. St. R. Co. v. Arnold, 100 Ga. 566; 28 S. E. 224; 3 Am. Neg. Rep. 753.

[62] Sugarman v. Atlanta Consol. St. R. Co., 94 Ga. 604; 21 S. E. 581.

the measure of damages for the loss by death of a child, less than four years old, is a fair compensation to the estate for the destruction of his power to earn money.[63] Again, the deprivation by death of a child's ability to render services should be considered, even though the minor son was serving a term in prison, which term would have expired before the child's majority.[64] But the jury need not itemize the value of probable future services.[65] It is also held that the father may recover for the loss of his daughter's services during her minority.[66] Nor is the recovery limited in Georgia to the loss of services but may include necessary expenses of death, etc.[67] It is decided, however, in Kentucky, that no recovery can be had by a father for the loss of a minor's services until his majority.[68] In addition to what we have above stated, there are also other matters relating to the measure of damages for the wrongful or negligent killing of a child, whether a minor or an adult, and in the latter case the damages must rest upon other factors or elements than loss of services and the obligation to support the child. These matters, however, are considered under other sections of this chapter relating to general elements of damages, expenses of funeral, sickness, etc., dependency for support, reasonable expectation of pecuniary benefit, the parents' condition in life, age, health and

[63] Louisville & N. R. Co. v. Creighton, 20 Ky. L. Rep. 1691, 1898; 50 S. W. 227; 15 Am. & Eng. R. Cas. N. S. 713.

[64] Amos v. Atlanta R. Co., 104 Ga. 809; 31 S. E. 42; 12 Am. & Eng. R. Cas. N. S. 857, citing Boyd v. Byrd, 8 Blackf. 113; 44 Am. Dec. 740, disapproving Osborn v. Gillett, L. R. 8 Exch. 88.

[65] Union P. R. Co. v. Dunden, 37 Kan. 1; 14 Pac. 501.

[66] Augusta Factory v. Davis, 87 Ga. 648; 13 S. E. 577, and act of October 27, 1887, giving the mother the right of recovery. If the statute only gives a right of recovery for the loss of services, no cause of action is stated by an averment of loss of "the financial value" of the life. Perry v. Georgia R. & Bkg. Co., 85 Ga. 193; 11 S. E. 605. An averment that plaintiff lost the services of his son during his minority is proper. Ft. Wayne, C. & L. R. Co. v. Byerle, 110 Ind. 100; 8 West. 549; 11 N. E. 6. An action by a father for loss of services is not barred by a judgment in favor of the personal representative. Hedrick v. Ilwaco R. & N. Co., 4 Wash. 400; 30 Pac. 714; 54 Am. & Eng. R. Cas. 45.

[67] Augusta Factory v. Davis, 87 Ga. 648; 13 S. E. 577. See sec. 881, herein.

[68] Harris v. Kentucky L. Co., 19 Ky. L. Rep. 1732; 45 S. W. 94, denying rehearing 43 S. W. 462. But see Covington St. R. Co. v. Packer, 9 Bush (Ky.), 455; 15 Am. Rep. 725.

life expectancy, the actual and legal relations of the parties, the particular statutory provisions of the several jurisdictions and other elements and factors.

§ 892. Death of children—Minority and majority.—In a Federal decision the case was reversed for want of evidence concerning the state of residence of the parties, since in one jurisdiction the deceased would have become of age at eighteen and in the other at the age of twenty-one,[69] and in a charge to the jury the court specified the net earnings of deceased after reaching full age as proper to be considered in actions for the killing of minors.[70] So it is decided in Illinois that the jury are not limited to the earnings of deceased until he should arrive at majority.[71] So in Kansas the recovery is not restricted to the value of services during minority, but benefits may be included which might reasonably be expected to accrue to the parents from deceased after attaining majority.[72] In Indiana, where damages are sought for the loss of services during minority, the measure of compensation is the value of said services from the time of death until majority, having in view the cost of support, etc., and also the child's prospects in life.[73] Again, in determining the value of deceased's life under the Kentucky statute, it is held in a Federal decision, where the action was brought by an administrator for the benefit of all interested, that such value should be represented by his earning power, but that earnings prior to majority, when the earnings would not belong to the deceased, should be excluded and also the earning power to any beneficiary.[74] So in Oregon the recovery is decided to be confined to minority of the child.[75] In Washington the recovery is

[69] Garther v. Kansas City, etc., R. Co. (U. S. C. C. W. D. Tenn.), 27 Fed. 544.

[70] Morris v. Chicago, M. & St. P. R. Co. (U. S. C. C. D. Iowa), 26 Fed. 23, the fact was also noted that the deceased boy would have been of full age at 21 and the girl at 18.

[71] West Chicago St. R. Co. v. Dooley, 76 Ill. App. 424; 3 Chic. L. J. Wkly. 238.

[72] Atchison, T. & S. F. R. Co. v. Cross, 58 Kan. 424; 49 Pac. 599.

[73] City of Elwood v. Addison (Ind. App. 1901), 59 N. E. 47.

[74] Linss v. Chesapeake & O. R. Co. (U. S. C. C. D. Ky.), 91 Fed. 964, distinguishing Louisville & N. R. Co. v. McElwain, 98 Ky. 700; 34 L. R. A. 788; Harris v. Kentucky Timber & L. Co., 19 Ky. L. Rep. 1731; 43 S. W. 462; 19 Ky. L. Rep. 1732; 45 S. W. 94.

[75] For note 75, see page 1089.

for loss of services prior to majority,[76] and also for damages to the child's estate accruing after he would have arrived at majority.[77] The same rule also exists in Iowa.[78] Again, where a

[76] Craft v. Northern P. R. Co., (Or.), 35 Pac. 250. But see Putnam v. Southern P. R. Co., 21 Or. 230; 27 Pac. 1033; 44 Alb. L. J. 517; 10 Ry. & Corp. L. J. 490.

[76] Under Code, Wash. 1881, sec. 9.

[77] Under sec. 8, Hedrick v. Ilwaco R. & N. Co., 4 Wash. 400; 30 Pac. 714. The court said in this case, "A parent at common law could maintain an action for damages for loss of services of his minor child, from the time of the injury until death, where death did not immediately follow the injury; and the object of the statute is to create a new and independent right of action for the loss of services subsequent to the decease of the child, which did not exist at common law, and this right is separate and distinct from that of the heirs or personal representatives. Two actions may thus spring from the same wrongful act, because two distinct injuries are thereby inflicted. But the actions are prosecuted in different rights, and the damages are given upon different principles. The damages recovered by a parent for loss of services of a child belong to the parent in his own right and are not distributable among the heirs, and do not become a part of the estate of the deceased. The measure of damages in such cases is the value of the child's services from the time of the injury until he would have attained the age of majority, taken in connection with his prospects in life, less the cost of his support and maintenance," per Andrews, C. J.

[78] It has not been and will not be disputed that in the case of an intestate, who had passed his majority, the damages sustained by his death, which may be recovered by his administrator, are such as result to his estate, and an estimate of which may be based upon evidence of his age, occupation, health, habits, etc. The damages that may be, in such action, recovered are not those that accrue to the next of kin, but are such as the estate of the deceased has suffered by the wrongful act. It is also said that because the father's claim and right to the services of the child cease at the child's majority, this is no reason that inquiry as to the damages sustained by the estate, should terminate at the same period of time. The loss of services of the child before majority is an injury to the father and not to the estate of the child. As the action is not to remunerate the father for his injury, the period at which his claim for services and consequent injury ceases will not terminate the loss and injury of the estate. Walters v. Chicago, Rock I. & P. R. Co., 36 Iowa, 460, 461, per Beck, Ch. J. See same case, 41 Iowa, 71. Again, in the same state, the court said: "We hold that the cause of action for the wrongful death survived to the administrator. That the damages to the estate of the infant, as in this case when there is no property or right, except the probable fruits of his personal earnings if he had lived, are limited to those which would arise at, and after he should have attained majority, that for such earnings as would accrue prior to his attaining majority, the father, or in this case where abandonment is shown, the mother

suit was brought by the father to recover damages for loss of services of the son up to twenty-one years of age, and also another action by said father as administrator for loss of pecuniary benefits after said son would have reached majority, the jury cannot allow all that would have been earned by deceased over his expenses after attaining majority, but the reasonable expectation of pecuniary benefit limits the amount to be awarded.[79]

§ 893. Collateral kindred.—As we have stated under another section the nearness of the relation may be of importance.[80] So that if the beneficiaries are older brothers there must be some evidence of a deprivation of a pecuniary advantage which the survivors had a reasonable ground to anticipate from their kinship with the deceased.[81] The constitution and statutes may, however, affect the distribution of damages so that half-sisters may be entitled to a proportionate share of the damages recovered,[82] and this is true, as brothers and sisters [83] and such relations may be entitled to damages under a special averment thereof affecting the amount of recovery.[84] But collateral kindred are not entitled as a wife or children would be, since the relation as such kindred and the reasonable expectations are to be consid-

could maintain the action under section 2556 above, which is the same as Rev. sec. 2792, ibid. The manner of bringing one action by a minor has nothing to do with this case." Lawrence v. Birney, 40 Iowa, 378, 379, per Cole, J. See further Wheelan v. Chicago, M. & St. P. R. Co. (Iowa), 52 N. W. 119; 49 Eng. R. Cas. 69; Morris v. Chicago M. & St. P. R. Co. (U. S. C. C. D. Iowa), 26 Fed. 23.

[79] Scheffler v. Minneapolis & St. L. R. Co., 32 Minn. 518; 21 N. W. 711.

[80] See secs. 872–876, herein. See Holland v. Brown (U. S. D. C. D. Or.), 35 Fed. 43, 48, noted in sec. 859 herein as to general elements.

[81] Wabash R. Co. v. Cregan (Ind. App. 1899), 54 N. E. 767, under Horner's Rev. Stat. 1897, sec. 284; Burns' Rev. Stat. 1894, sec. 285.

[82] Berg v. Berg, 20 Ky. L. Rep. 1083; 48 S. W. 432; Const. Ky. sec. 241; Ky. Gen. Stat. ch. 31, secs. 1, 11.

[83] Freeman v. Illinois Cent. R. Co. (Tenn. 1901), 64 S. W. 1; Shannon's Code, secs. 4025, 4172, subsec. 5.

[84] Lyons v. Cleveland & Toledo R., 7 Ohio St. 336. Brothers and sisters and not the mother are next of kin. Hall v. Crain (Ohio), 3 West. Law Month. 137. Sister or brother has no pecuniary interest and cannot recover. The action arises upon an enforceable interest or an obligation to support. Halloran v. Cleveland, P. & A. R. Clev. Rec. 11.

ered.[85] In Mississippi a brother and sister have a statutary right to recover, but an illegitimate sister is not included.[86]

§ 894. Recovery of interest.—Under the English statute for loss of life from a collision, the wrongdoer is liable, in addition to the sum specified as payable, to interest on the same, from the date thereof, until payment into court.[87] In a case where there were two columns in the annuity tables, specifying different notes of computation of interest, and the amount awarded by the jury was within that to which the plaintiff would be entitled at either rate, the court refused to reverse the verdict for the failure of the trial court to inform the jury as to said columns.[88]

§ 895. Limitation of damages.—The amount of damages recoverable is limited by statute in most of the states considered under this chapter.[89] There seems to be a tendency on the part of some courts to limit the damages to a sum not in excess of that fixed by statutes of other states as the maximum of recovery, upon the theory that the concurrent judgment of the legislatures of many states justifies the acceptance by the court of such amount as the extent or limitation of the damages.[90]

[85] Groff v. Cincinnati & I. R. (Ohio), 1 Cin. Sup. Ct. Rep. 264.

[86] Illinois Cent. R. Co. v. Johnson, 77 Miss. 727; 28 So. 753; 51 L. R. A. 837, under Acts, 1898, p. 82.

[87] The Crathie, 66 L. J. P. D. & A. N. S. 93 (1897), p. 178; 76 Law T. Rep. 534. See Central R. Co. v. Sears, 66 Ga. 499.

[88] Western & A. R. Co. v. Bussey, 95 Ga. 584; 23 S. E. 207.

[89] *Connecticut.* $5,000.
District of Columbia. $10,000.
Indiana. $10,000.
Kansas. $10,000,
Massachusetts. Under indictment fine is $500, and not more than $5,000. In case of death of employee of a railroad company not to exceed $5,000, nor be less than $500. In case of death from defective highway or bridge, etc., not to exceed $1,000. Under Employer's Liability Act not exceeding $5,000 for injury and death. Where employee is killed instantly or without conscious suffering not less than $500, nor more than $5,000. In case passenger, etc., is killed not less than $500, nor more than $5,000.
Minnesota. $5,000.
New Hampshire. $7,000.
Ohio. $10,000.
Oklahoma. $10,000.
Oregon. $5,000.
Washington. Under Code 1891, $5,000. See secs. 842, 845, herein, as to citations of statutes.

[90] Farmers' Loan & T. Co. v. Toledo, A. A. & N. M. R. Co. (U. S. C. C. N. D. Ohio W. D.), 67 Fed. 73, per Rick, Dist. J.; 2 Ohio L. News, 305, aff'g 2 Ohio L. News, 184.

As we have stated under another section, the effect of such a ruling is to incorporate into the law of one state the legislation of another state, which with all proper respect to the courts does not seem to us consistent with the policy of the law. If the legislators of a particular state had intended to limit the damages recoverable, they would have undoubtedly so provided, and courts should be bound by the legislative enactments of that particular state wherein the action is brought, especially so when the only basis of recovery in case of death by wrongful, etc., act is the statute of such state. Courts do not sit to perform the functions of the legislature; they do not make laws or add clauses to statutes, nor interpret statutes, so as to engraft new terms thereon not within the original intendment.

§ 896. Defenses—Generally—Mitigation of damages.—Specific acts of intoxication of the intestate may be shown in mitigation of damages.[91] And it may be shown for the same purpose that the homicide was committed in resisting a battery by deceased.[92] And deceased's declarations after the injury that she felt much better than before the accident are competent,[93] and the rules of a street railway company are relevant.[94]

§ 897. Insurance—Mitigation of damages—Set-off.—Insurance on deceased's life, even though assets of the estate, cannot be set off against the damages recoverable, nor is evidence thereof admissible in mitigation of damages.[95] In a

[91] Wright v. Crawfordsville, 142 Ind. 636; 43 N. E. 227. See Holland v. Brown (U. S. D. C. D. Or.), 35 Fed. 43, in note to sec. 859, herein. See also sec. 868, herein.

[92] Weekes v. Cottingham, 58 Ga. 559.

[93] Bond Hill v. Atkinson, 16 Ohio C. C. 470, rev'g 1 Ohio N. R. 166; 2 Ohio Dec. 48.

[94] Cincinnati St. R. Co. v. Altemeier, 60 Ohio St. 10; 41 Ohio L. J. 245; 53 N. E. 300; 6 Am. Neg. Rep. 179, citing and considering several decisions. As to reputation of plaintiff, see sec. 899 herein.

[95] Western & A. R. Co. v. Meigs, 74 Ga. 857; Sherlock v. Alling, 44 Ind. 184; Spaulding v. Chicago, St. P. & K. C. R. Co., 98 Iowa, 205; 67 N. W. 227; Ladd v. Foster (U. S. D. C. D. Or.), 31 Fed. 827. This decision was in 1887, and the court while so holding said the question could hardly be considered as judicially settled, at least in the Federal courts (but see Clune v. Ristine [U. S. C. C. App. 8th C. Dist. Colo.], 36 C. C. A. 450; 94 Fed. 745; 6 Am. Neg. Rep. 416; 2 Denver Leg. Adv. 593; 15 Am. & Eng. R. Cas. N. S. 761). In the Ladd case, the court continues

comparatively recent case it is decided that the pledge by deceased of his certificate in a relief association as security for a loan did not discharge the widow's right of recovery.[96]

§ 898. Remarriage—Mitigation of damages.—The subsequent marriage of a husband or widow cannot be admitted in evidence to affect the measure of damages.[97]

§ 899. Reputation of plaintiff or next of kin or of deceased.—Evidence of the good or bad reputation of the next of kin is inadmissible.[98] And evidence may be rejected that the

as follows: "The American courts in which this question has been considered have taken another view of the matter" (viz, differing from the English rule) "and hold that as the defendant in such case does not contribute to the fund derived from the insurance, and as it is not the result of or connected with the act causing the death, therefore, he can have no just claim to the benefit of it in mitigation of the damages resulting from such death." Id. 833, per Deady, J., citing Sherlock v. Alling, 44 Ind. 199; Althorf v. Wolfe, 22 N. Y. 355; Terry v. Jewett, 78 N. Y. 338; Kellogg v. Ry. Co., 79 N. Y. 77, and considering also The Propeller v. Mollison, 17 How. 153. The principle in The Atlas, 93 U. S. 310, declared inapplicable. The English rule is the contrary. Id. p. 833, citing Bradburn v. Ry. Co., L. R. 10 Exch. 1; Hicks v. Ry. Co., 4 Best & S. 403 n.; Franklin v. R. Co., 3 Hurl. & N. 211, per Bramwell, J., who said, "That the damages were to be a compensation to the family of the deceased equivalent to the pecuniary benefits which they might have reasonably expected from the continuance of his life. If therefore the person claiming damages was put by the death of his relative into possession of a large estate, there was no loss. He was a gainer by the event and similarly whatever comes into the possession of the family who have suffered by the death of their relative by reason of his death must be taken into account."

[96] Cowen v. Ray (U. S. C. C. A. Ind.), 108 Fed. 320; 47 C. C. A. 352.

[97] Georgia R. & Bkg. Co. v. Garr, 59 Ga. 277; 24 Am. Rep. 492; Davis v. Guarnieri, 45 Ohio St. 470; 15 N. E. 350; 13 West. 438; 4 Am. St. Rep. 548. See also Thomas v. East Tenn. V. & G. R. Co. (U. S. C. C. N. D. Ga.), 63 Fed. 420; 60 Am. & Eng. R. Cas. 259.

[98] "Exception was taken at the trial to the exclusion of certain depositions taken for the purpose of attacking the reputation of the plaintiff. The ruling was that evidence tending to show the wealth or means of support of the plaintiff, she being one of the next of kin, was admissible, but not evidence merely tending to show the reputation of the plaintiff. This evidence if admitted could only affect the amount of the recovery, and it seemed to the court upon the trial that it was immaterial. In cases of this character where the damages are limited to the pecuniary

deceased was often in jail and frequently in criminal scrapes, and was barely able to earn enough money to defend criminal charges.[99]

§ 900. Recovery over of damages.—If a third person's breach of duty causes the accident resulting in death, he must have been called upon by notice to come in and defend the suit, otherwise the original defendant cannot retain control of the defense and bind such third party by the result, and the amount recovered by judgment will not, in such case, be conclusive as to the latter. The court, however, said, in this case, "How far, if at all, the defendants can be held liable for damages which the present plaintiff was compelled to pay, and did pay to the next of kin . . . we are not now called upon to determine."[100]

§ 901. Distribution and apportionment of damages.—Although most of the statutes relating to the recovery of damages in cases of death by wrongful, etc., act, provide for the distribution or apportionment of the amount recovered, to certain designated beneficiaries in certain proportions, nevertheless, the consideration of these statutes so far involves an examination and discussion of the statutes relating to the distribution of estates of decedents, that the subject is not properly within the scope of this treatise. We will therefore only cite and notice in the appended note a few decisions relating to the subject.[1]

loss of the next of kin caused by the death of the relative, is it permissible, in order to increase or diminish the amount of the damages, for either party to prove that the next of kin are possessed of a high character, or the contrary? If it be true that a poor reputation should diminish the damages, then a good reputation should increase the same. Yet this cannot be true. There may be cases presenting peculiar features in which such evidence might be competent, but in a case like the present the introduction of such evidence would not enlighten the jury upon the question of loss caused by the death of the son and brother, but it would introduce an issue which would unless it was clearly sustained, and might even then tend to prejudice the jury against the defendants and lead to the rendition of larger verdicts than might otherwise be given. The motion for new trial is therefore overruled." Hardy v. Minneapolis & St. L. R. Co. (U. S. C. C. D. Minn.), 36 Fed. 657, 660, per Shiras, J.

[99] Boswell v. Barnhart, 96 Ga. 521; 23 S. E. 414.

[100] Consolidated Hand Method Lasting Mach. Co., 171 Mass. 127, 135; 50 N. E. 464, per Field, C. J.

[1] Southern P. R. Co. v. Tomlinson,

163 U. S. 369; 16 Sup. Ct. 1171; 41 L. Ed. 193, under Ariz. Rev. Stat. 1887, secs. 2145–2155. Coleman v. Heyer, 113 Ga. 420; 38 S. E. 962 (holding that adult children are not entitled to share in the judgment, under Civ. Code, sec. 3828); Perry v. Carmichael, 95 Ill. 519; Goltra v. People, 53 Ill. 224; Falkenau v. Rowland, 70 Ill. App. 20; Mayhew v. Burns, 103 Ind. 328; 1 West. 580; 2 N. E. 793; Missouri P. R. Co. v. Bennett, 5 Kan. App. 231; 47 Pac. 183; 14 Nat. Corp. Rep. 6, aff'd 49 Pac. 606; 7 Am. & Eng. R. Cas. N. S. 534, holding that the damages are for the benefit of the estate and not for the benefit of the widow or next of kin. Berg v. Berg, 20 Ky. L. Rep. 1083; 48 S. W. 432. The constitutional provision as to damages for death and the statute relating to distribution construed as to who entitled to the damages. Carruthers v. Neal, 12 Ky. L. Rep. 567; 14 S. W. 599, holding that fund recovered, under Gen. Stat. p. 551, ch. 57, sec. 3, is not assets of estate but goes to the beneficiaries. Givens v. Kentucky C. R. Co., 11 Ky. L. Rep. 452; 12 S. W. 257, holds that Gen. Stat. ch. 57, sec. 1, contains no direction as to disposition of the damages, and they must be held by the representative for the estate. Richmond v. Chicago & W. M. Co., 87 Mich. 374; 49 N. W. 621; 49 Am. & Eng. R. Cas. 367; 10 Ry. & Corp. L. J. 344, holding that the statute of distributions may affect the damages so as to entitle those not suffering loss to a share thereof, and that the statute of distributions in force at the time of death governs. Matter of Snedeker v. Snedeker, 164 N. Y. 58, 62, 63; 58 N. E. 4, aff'g 63 N. Y. Supp. 580, holding that the proceeds of the recovery are to be distributed among the class named as if they were unbequeathed assets remaining after the payment of debts and expenses, and that, where deceased left no children, his father, under Code Civ. Proc. sec. 2732, subd. 7, was entitled to half the damages recovered by the widow, even though the father was a man of wealth. Stuber v. McEntee, 142 N. Y. 200, 203; 31 Abb. N. C. 246; 58 N. Y. St. R. 455; 36 N. E. 878 (case reverses 47 N. Y. St. R. 294; 19 N. Y. Supp. 900), holding that the cause of action is no part of the estate of deceased, and is not subject to debts, nor to the ordinary rules applicable to the settlement and distribution of such estates. For other New York cases, see Murphy v. New York C. & H. R. R. Co., 88 N. Y. 445; Matter of Degaramo, 86 Hun (N. Y.), 390; 67 N. Y. St. R. 215; Lowman v. Elmira C. & N. R. Co., 85 Hun (N. Y.), 188, aff'd 154 N. Y. 765. See further, Warner v. Western N. C. R. Co., 94 N. C. 250. Holland v. Brown (U. S. D. C. D. Or.), 35 Fed. 43, holding that the amount recovered is assets of the estate. Maher v. Philadelphia Tract. Co., 181 Pa. 391; 37 Atl. 571; 40 W. N. C. 477; 3 Am. Neg. Rep. 85, 86, holding that the damages are personal estate of deceased and as such distributable first to the payment of debts, citing In re Taylor's Estate, 179 Pa. 254; 36 Atl. 230. Allison v. Powers, 179 Pa. 531; 27 Pitts. L. J. N. S. 408; 39 W. N. C. 522; 36 Atl. 333, holding that the children share proportionately as they would in the personal property of the father under the intestate law. North Pa. R. Co. v. Robinson, 44 Pa. St. 175; In re Mayo's Estate, 60 S. C. 401; 38 S. E. 634; Ex parte Northeastern R. Co., id. Felton v. Spiro (U. S. C. C. A. 6th C. E. D. Tenn.), 78 Fed. 576; 24 C. C. A. 321; 47 U. S. App. 402; 2 Am. Neg. Rep. 682, declaring the damages go to the

widow and next of kin, free from the claims of creditors, to be distributed as personal property. Texas & P. R. Co. v. Gentry, 163 U. S. 353; 16 Sup. Ct. 1104, holding that, although the recovery is by the jury apportioned among different persons, it is an entirety and not separate and distinct in favor of each. Galveston v. Hughes (Tex. Civ. App. 1899), 54 S. W. 264, holding that a judgment in favor of parents alone is community property and that it is not necessary to find a separate amount for each. Davies v. Thompson (Tex. Civ. App.), 50 S. W. 1062, verdict need not specify parts to which husband and children take respectively. See further Missouri, K. & T. R. Co. v. Evans, 16 Tex. Civ. App. 68; 41 S. W. 80; International & G. N. R. Co. v. De Bajligethy (Tex. Civ. App.), 28 S. W. 829; International & G. N. R. Co. v. McDonald, 75 Tex. 41, 48; 12 S. W. 860. Galveston, H. & S. A. R. Co. v. Kutac, 72 Tex. 643; 11 S. W. 127; Galveston, H. & S. A. R. Co. v. Le Gierse, 56 Tex. 198; Houston v. T. C. R. Co. v. Moore, 49 Tex. 31; Norfolk & W. R. Co. v. Stevens, 97 Va. 631; 34 S. E. 525; 46 L. R. A. 367; Powell v. Powell, 84 Va. 415; 4 S. E. 744, holding that money received on a compromise must, after paying costs and attorneys' fees, be disposed of under the statute of distributions. Hubbard v. Chicago & N. W. R. Co., 104 Wis. 460; 80 N. W. 454, recovery constitutes no part of deceased's estate. Bernard v. Grand Trunk R. Co., Rap. Jud. Quebec, 11 C. S. 9, damages under Quebec Civ. Code, art. 1056, forms no part of his succession. Bulwer v. Bulwer, 53 L. J. Ch. 402; 25 Ch. D. 409; 32 W. 380, holding that, where money is received by way of a compromise or settlement, the court could distribute the fund among those entitled in the same manner as the jury could have done. Sanderson v. Sanderson, 36 L. T. 847, holding that where money was paid into court, the widow was entitled to one third, and four infant children to two thirds, by analogy to the statute of distributions. Condliff v. Condliff, 29 L. T. 831; 22 W. 325, holding that where a lump sum was paid, under a judge's order, and accepted in satisfaction, and no apportionment had been made, and as the statute providing for payment into court (27 & 28 Vict. ch. 95, sec. 2), contained no directions for apportionment, a court of law could not apportion the sum among the several beneficiaries, the plaintiff's remedy, if any, being in equity. Steele v. Great Northern Ry., 26 L. R. Ir. 96, where the court refused to grant an order allowing interested parties to appear at the trial and give evidence as to the amount of their share of the damages, or that they might be made parties. Johnston v. Great Northern Ry., 20 L. R. Ir. 4, where the court in a similar case refused to permit the father to be made a party, but gave him liberty to appear at the trial and give evidence as to his share of the money lodged in court. In an action by a widow for damages for the death of her husband, money was lodged in court in satisfaction of the action, and the widow was allowed to draw it out, on a consent signed by her being made a rule of court, whereby she agreed to a division of the money in certain specified proportions between herself and three infant children. Shallow v. Vernon, Ir. R. 9 C. L. 150; 10 Mew's Eng. Dig. (1898) p. 113.

CHAPTER XXXVII.

INSTANTANEOUS DEATH.

§ 902. Instantaneous death — Conscious suffering—Preliminary remarks.
903. Instantaneous death — Common law.
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906. When instantaneous death precludes recovery.
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§ 902. Instantaneous death—Conscious suffering—Preliminary remarks.—The factors of instantaneous death and conscious suffering may affect either the right of action or the extent of the damages, having in view the character of the statute and the express terms thereof on the one hand, and on the other the absence of any inclusive words expressly covering or directly applicable to the question. The common law is also to be considered. It has been assumed by some authorities that the point whether or not the statute is a survival one, is a test controlling the recovery in case of instantaneous or immediate death, but this is not so, at least not to the extent that it would justify formulating a rule based on that test. And here it is proper to state that there is a distinction between a mere nonabatement by death of a cause of action or its survival, and a statute which permits a recovery for the loss sustained by a wrongful, etc., killing, even though such statute be in effect merely a survival statute. Again, whether or not there was conscious suffering or the death instantaneous, may or may not

affect the question of damages, it being dependent upon the statute or its construction, or the common law and its application in relation to physical and mental suffering of the deceased. All these matters will, however, sufficiently appear under the following sections in so far as there are decisions upon these points.

§ 903. Instantaneous death—Common law.—At the common law an action could not be maintained by a husband to recover damages for the negligent, etc., killing of his wife and the consequent loss of her services, society, expenses incurred and the like, where the death was instantaneous, since some period of time must have elapsed between her injury and her death to occasion such loss.[1] And the same rule has been applied in case of the instantaneous death of a minor son.[2] Nor can a master recover in an action for injuries which causes the death of his servant.[3]

[1] Womack v. Central R. & Bkg. Co., 80 Ga. 132; 5 S. E. 63; Eden v. Lexington & F. R. Co., 14 B. Mon. (Ky.) 165; Green v. Hudson R. R. Co., 2 Keyes (N. Y.), 294; 2 Abb. Dec. (N. Y.) 277; 28 Barb. (N. Y.) 9; 16 How. Pr. (N. Y.) 230; 31 Barb. (N. Y.) 260. See Gusso v. Delaware, L. & W. R. Co., 50 N. J. L. 317; 13 Atl. 233; 11 Cent. 574; Phillippi v. Wolff, 14 Abb. Pr. N. S. (N. Y.) 196; Lucas v. New York, etc., R. R. Co., 21 Barb. (N. Y.) 245.

[2] Gulf, C. & S. F. R. Co. v. Beall. 91 Tex. 310; 42 S. W. 1054; 41 L. R. A. 807, and note; 66 Am. St. Rep. 892, per Denman, Assoc. J., citing Baker v. Bolton, 1 Camp. 493; Osborn v. Gillett, L. R. 8 Ex. 88, and the court said, "Still the rule itself is a well established principle of the common law of England adopted by the state, by act approved January 26, 1840, and we feel bound thereby." Id. 91 Tex. 312.

[3] Where the declaration alleged the negligent killing of the plaintiff's daughter and servant, and claimed damages for the loss of services and for burial expenses paid by plaintiff, the defendants pleaded: first, that the daughter and servant were killed upon the spot by the act complained of, so that the plaintiff could not and did not sustain damages entitling him to sue; and secondly that the act complained of was a felonious act on the part of defendant's servant, and that this servant had not before the action been tried, committed or prosecuted in any way, in respect of the same. Held that the second plea afforded no answer to the declaration, and held, by Kelly, C. B., and Pigott, B., that the first plea afforded a good answer, on the ground that, apart from the 9 & 10 Vict. ch. 93, no civil action is maintainable against a person who has by negligence caused the death of another, but by Bramwell, B., that the first plea afforded no answer and that the action was maintainable. Osborn v. Gillett, 42 L. J. Ex. 53; 8

§ 904. Interval between injury and death—Medical expenses and loss of business—Action on contract.—Where a passenger on a railway was injured by an accident, and after an interval died in consequence, it was decided that his executrix might, in an action for breach of contract, recover the damages to deceased's personal estate arising in his lifetime from medical expenses and loss occasioned by his inability to attend to business.[4]

§ 905. When instantaneous death does not preclude recovery.—In a large number of the states a recovery can be had, even though the death was instantaneous, the right being independent of such fact.[5] And so, even though there was no suffering or injury for which the person killed could have maintained an action, since it is not indispensable to show that the

Ex. 88; 28 L. T. 197; 21 W. 409; 10 Mew's Eng. Dig. (1898) p. 107.

[4] Bradshaw v. Lancashire & Y. Ry., 44 L. J. C. P. 148; L. R. 10 C. P. 189; 31 L. T. 847; 23 W. 310; 10 Mew's Eng. Dig. (1898) p. 115.

[5] Murphy v. New York & N. H. R. Co., 30 Conn. 184; Rev. Stat. tit. 1, sec. 83. The statute of this state as we have stated elsewhere is a survival one. Instantaneous death, in a railroad collision, of a fireman, does not prevent a recovery under Mans. Dig. Ark. sec. 5225, in force in Indian Ty. Missouri, K. & T. R. Co. v. Elliott (U. S. C. C. A. 8th C. Ind. Ty.), 102 Fed. 96, citing Ardmore Coal Co. v. Bevil (U. S. C. C. A. 8th C. Ind. Ty.), 61 Fed. 757; 10 C. C. A. 41; 27 U. S. App. 96; Broughel v. Telephone Co., 72 Conn. 617; 45 Atl. 435. See further Cleveland, etc., R. Co. v. Badely, 150 Ill. 328; Hamilton v. Morgan's L. & T. R. & S. S. Co., 42 La. Ann. 824; 8 So. 585; Sweetland v. Chicago & G. T. R. Co., 117 Mich. 329; 75 N. W. 1066; 5 Det. L. N. 283; 43 L. R. A. 568; Matz v. Chicago & A. R. Co. (U. S. C. C. W. D. Mo.), 85 Fed. 180; Roach v. Imperial Min. Co. (U. S. C. C. D. Nev.), 7 Fed. 698; 7 Sawy. 224, under Comp. Laws, Nev. p. 39, sec. 115; Whitford v. Panama R. Co., 23 N. Y. 465; Brown v. Buffalo & S. L. R. Co., 22 N. Y. 191, under Stat. 1847, sec. 1; Perham v. Portland Gen. Elec. Co., 33 Or. 45; 53 Pac. 14; 40 L. R. A. 799, citing numerous cases; Fink v. Garman, 4 Wright (Pa.), 95, under Act, April 15, 1815, sec. 19; Reed v. Northeastern R. Co., 37 S. C. 42; 16 S. E. 289; Gen. Stat. secs. 2183–2186; Price v. Richmond & D. R. Co., 33 S. C. 556; 12 S. E. 413; 26 Am. St. Rep. 700, action survives; Whaley v. Catlett (Tenn. 1899), 53 S. W. 131; Haley v. Mobile & O. R. Co., 7 Baxt. (Tenn.) 239, under Code, sec. 2291–2293; Nashville & C. R. Co. v. Price, 2 Heisk. (Tenn.) 580; Sternenberg v. Mailhers (U. S. C. C. A. 5th C. E. D. Tex.), 39 C. C. A. 408; 99 Fed. 43, under Rev. Stat. 1895, art. 3017; International & G. N. R. Co. v. Kindred, 57 Tex. 491, under Rev. Stat. sec. 2899; Boyden v. Fitchburg R. Co., 70 Vt. 125; 39 Atl. 771; 10 Am. & Eng. R. Cas. N. S. 523, under Stat. sec. 2451. Examine Winnt v.

injured person lived long enough to have a right to sue,[6] it being declared that the interval which exists between the injury and death affects only as to its duration the amount of damages.[7]

§ 906. When instantaneous death precludes recovery.—If the statutory ground of action rests upon the assumption that the deceased was once entitled to sue for the injury, the statute being a survival one, the fact that the death is instantaneous precludes a recovery under some of the decisions.[8] It is also decided in other jurisdictions that the statute, providing for the recovery of damages in case of wrongful, etc., death, does not apply where the deceased died instantly.[9]

§ 907. Pain and suffering of deceased—Injury and death at substantially same moment or inseparable.—It has been decided that it is error to submit the issue of physical suffer-

International & G. N. R. Co., 74 Tex. 32; 11 S. W. 907; 5 L. R. A. 172; Weeks v. New Orleans & C. R. Co., 32 La. Ann. 615. See sec. 904, herein.

[6] Matz v. Chicago & A. R. Co. (U. S. C. C. W. D. Mo.), 85 Fed. 180, and cases cited; Roach v. Imperial Min. Co. (U. S. C. C. D. Nev.), 7 Fed. 698; 7 Sawy. 224, per Hilyer, D. J; Perham v. Portland Gen. Elec. Co., 33 Or. 451; 40 L. R. A. 799, and numerous cases cited and distinguished; Reed v. Northeastern R. Co., 37 S. C. 42; 16 S. E. 289, under Gen. Stat. secs. 2183–2186. See case in next following note.

[7] Brown v. Chicago & N. W. R. Co., 102 Wis. 137; 77 N. W. 748; 5 Am. Neg. Rep. 255; 44 L. R. A. 579; 13 Am. & Eng. R. Cas. N. S. 603, rehearing denied, 78 N. W. 771; 44 L. R. A. 585, and cases cited.

[8] Belding v. Black Hills & Ft. P. R. Co. (Wis.), 53 N. W. 750; 52 Am. & Eng. R. Cas. 624, under Dak. Comp. Laws, sec. 5498. Where death is simultaneous with injury and the right is to recover where the intestate might have recovered, no action lies. Illinois C. R. Co. v. Pendergrass, 69 Miss. 425; 12 So. 954; 47 Alb. L. J. 495. See McVey v. Illinois C. R. Co., 73 Miss. 487; 19 So. 209; 3 Am. & Eng. R. Cas. N. S. 371; Beckman v. Georgia P. R. Co. (Miss.), 12 So. 956, under Miss. Code, secs. 2078, 2079; Louisville & N. R. Co. v. Burke, 6 Cold. (Tenn.) 45; contra, Matz v. Chicago & A. R. Co. (U. S. C. C. W. D. Mo.), 85 Fed. 180; Roach v. Imperial Min. Co. (U. S. C. C. D. Nev.), 7 Fed. 698; 7 Sawy. 224, per Hilyer, J.

[9] Husband cannot recover for wife's death in such case. Womack v. Central R. & Bkg. Co., 80 Ga. 132; 5 S. E. 63; Grosso v. Delaware, L. & W. R. Co., 50 N. J. L. 317; 11 Cent. 574; 13 Atl. 233, under Act, March 3, 1848, Rev. 294. Nor to a minor child's death. Bligh v. Biddeford & S. R. Co., 94 Me. 499; 48 Atl. 112; Stat. 1891. The statute does not apply where death is instantaneous. Lake Shore & M. S. R. Co. v. Dylinski, 67 Ill. App. 114; 2 Chic. L. J. Wkly. 77. But see Cleveland, etc., R. Co. v. Badely, 150 Ill. 328.

ing of the deceased to the jury, where the death of an engineer was caused by a locomotive explosion, and his body was found on the snow, about two hundred feet away, with blood escaping from the mouth, nose and ears, life being extinct and there being no signs of mangling, and this even though the statute allows as an element of damages the mental and physical pain of deceased.[10] So where the interval of conscious suffering was but for a moment, a verdict of four thousand dollars was set aside.[11] Again, in another decision, it is said: "The sufferings of deceased were merely momentary and could hardly become the subject of damages under any circumstances." [12] Opposed, however, to the decision first above considered under this section, it is declared that the question whether deceased suffered mental or bodily pain, where death was instantaneous, is for the jury, and a charge that damages may be allowed therefor in such case, was decided to be proper where there was no satisfactory evidence as to the length of time deceased had survived, since it would be assumed that there existed a period of time wherein a consciousness of impending death would exist and that agony would be suffered in the mind.[13]

§ 908. Survival without or with consciousness or conscious suffering.—In Arkansas recovery may be had even though de-

[10] Hastings Lumber Co. v. Garland (U. S. C. C. App. 1st Cir.), 115 Fed. 15, 16, citing and considering, Kelley v. Railroad Co. (C. C.), 48 Fed. 663; Railroad Co. v. Clark, 152 U. S. 230; 14 Sup. Ct. 579; 38 L. Ed. 422; Sutherland on Dam. (2d ed.) 277; Corliss v. Railroad, 63 N. H. 404; Clark v. City of Manchester, 64 N. H. 471; 13 Atl. 867; id. 62 N. H. 577; The Corsair, 145 U. S. 335, 348; 12 Sup. Ct. 949; 36 L. Ed. 727; The Robert Graham Dun, 17 C. C. A. 90; 70 Fed. 270, 272.

[11] St. Louis, I. M. & S. R. Co. v. Dawson, 68 Ark. 1; 56 S. W. 46, citing several cases.

[12] Holmes v. Oregon & Cal. R. Co. (U. S. D. C. D. Or.), 5 Fed. 523, 542, per Deady, D. J., under Civ. Code, Or. sec. 367.

[13] Western & A. R. Co. v. Roberson (U. S. C. C. A. 6th C. E. D. Tenn.), 61 Fed. 592, under Mill & V. Code, Tenn. secs. 3130, 3132, 3134, making such pain an element of damages. See also Red River Line v. Cheatham (U. S. C. C. A. La.), 9 C. C. A. 124; 60 Fed. 517, rev'g Cheatham v. Red River Line (U. S. D. C. E. D. La.), 56 Fed. 248, which held that pain and suffering of a drowning person are substantially contemporaneous with death and inseparable from it, and cannot be considered upon the question of damages. See sec. 908, herein.

ceased never became conscious after the injury, where she survived after the wrongful or negligent act.[14] Although it is also decided, that if conscious suffering is shown by exclamations of deceased, a reasonable verdict for damages will be sustained, even though the period of such suffering was brief.[15] So where the pain and anguish was intense, lasting for twenty-four hours, the body being terribly mangled, and the shock to the system being most severe, an award of a reasonable sum to the estate was not set aside.[16] But where the death was occasioned by collision of vessels, and the only evidence of suffering was that deceased was in the water but an hour before drowning, a verdict of three thousand five hundred dollars was declared excessive.[17] In another case, death ensued in four hours after the injury was received, and the damages for pain and suffering were permitted to stand as not being excessive.[18]

§ 909. Instantaneous or immediate death—Conscious suffering.—Under the Maine statute, which gives an action where the employee is instantly killed or dies without conscious suffering, the question whether unconsciousness and remaining in a comatose condition for some minutes until death, came within the statute, was mentioned but not discussed in a recent case, it being declared unnecessary to determine the point.[19] But it has been determined in that state that a recovery is confined to cases where death is immediate.[20]

§ 910. Instantaneous death—Conscious suffering—Massachusetts decisions and opinions.—Under that section of the

[14] St. Louis, I. M. & S. R. Co. v. Dawson, 68 Ark. 1; 56 S. W. 46.

[15] St. Louis S. W. R. Co. v. Mahoney, 67 Ark. 617; 55 S. W. 840. Award was $500 to next of kin, and $1,000 to estate.

[16] St. Louis, I. M. & S. R. Co. v. Robbins, 57 Ark. 377; 21 S. W. 886. $2,500 was given.

[17] The Robert Graham Dun (U. S. C. C. A. 1st C. N. H.), 17 C. C. A. 90; 33 U. S. App. 297; 70 Fed. 270.

[18] St. Louis, I. M. & S. R. Co. v. McCain, 67 Ark. 377; 55 S. W. 165. $500 awarded for pain and suffering, and $2,500 to the children for pecuniary loss.

[19] Conley v. Portland Gaslight Co. (Me. 1902), 52 Atl. 656.

[20] Sawyer v. Perry, 88 Me. 42; 33 Atl. 660, under Stat. 1891, ch. 124; State v. Grand Trunk R., 61 Me. 114; 14 Am. Rep. 552; State v. Maine Cent. R. Co., 60 Me. 490, under Rev. Stat. ch. 51, sec. 36.

Employer's Liability Act, which provides for a recovery "where an employee is instantly killed or dies without conscious suffering," etc., the action for death without conscious suffering takes the place of an action that would have been brought by the employee himself if the harm had been less, and by his representative if it had been equally great, but the death had been attended with pain.[21] Again, in another case, brought under the same statute, but within the first two clauses thereof, by the next of kin who were dependent upon the deceased for support, the court said: "The plaintiffs concede that if death was with conscious suffering the action, which is brought under the Employer's Liability Act by the next of kin, who were dependent on him, cannot be maintained. The accident occupied only a few seconds. . . . We do not see how, without resorting to metaphysical nicety, the second in which the deceased was killed can be separated from the second in which he fell, and the seconds which intervened between that and the death, so as to say that the death was without conscious suffering," and it was held that his death was preceded by conscious suffering and precluded an action for instantaneous death.[22] In Knight v. Overman Wheel Co.,[23] the action was for death and conscious suffering, and the language of the court was as follows:[24] "The seventeenth request was, 'There is no sufficient evidence that the plaintiff's intestate consciously suffered, and there can be no recovery upon that ground.' The Stat. of 1887, ch. 270, as amended by Stat. of 1892, ch. 260, allows the recovery by the widow or next of kin, both where the employee is instantly killed or dies without conscious suffering, and where the death was not instantaneous or is preceded by conscious suffering. In the case at bar, it clearly appears by the evidence that the death was not instantaneous, and the only question is whether there was evidence of conscious suffering. If an injured person remains conscious after the injury, even for a short time only, it is a reasonable conclusion that he lived in a state of conscious suffering.[25] . . .

[21] Mulhall v. Fallon, 176 Mass. 266, 269; 57 N. E. 386; 79 Am. St. Rep. 309, per Holmes, C. J., under Stat. 1887, ch. 270, sec. 1, cl. 3.

[22] Martin v. Boston & M. R., 175 Mass. 502, 504; 56 N. E. 719, per Morton, J., under Stat. 1887, ch. 270, sec. 2; id. secs. 1, 2, as am'd Stat. 1892, ch. 260.

[23] 174 Mass. 455; 54 N. E. 890.

[24] Id. 463, per Lathrop, J.

[25] Citing Malcahey v. Western Car

We are of opinion that upon this evidence, it was a question for the jury whether or not the death of the intestate was preceded by conscious suffering."[26] In Clare v. New York & N. E. R. Co.,[27] the real question was as to the effect of a judgment between the same parties in a claim for personal injuries,[28] and the court said, that the statute[29] did not take away the cause of action at common law which an employee had against his employer for personal injuries, and that the former, or if he has died after conscious suffering, his administrator, can sue either under the common law or under the statute.[30] Again, it is declared that the Pub. Stat. ch. 112, sec. 212, as amended by the Stat. of 1883, ch. 243, and the Employer's Liability Act[31] combined, do not give a right of recovery against a railroad company for the death of an employee where no conscious suffering and where no widow or next of kin exist, and that the right to sue under the Employer's Liability Act is limited to the cases specified.[32]

Wheel Co., 145 Mass. 281, 287, per Devens, J.

[26] The evidence in this case was that deceased, after the injury, exclaimed, "Oh! I am gone. Boss, it isn't any use, I am done for," and that he "hollered" once or twice and groaned three or four times.

[27] 172 Mass. 211; 51 N. E. 1083; 13 Am. & Eng. R. Cas. N. S. 569.

[28] 167 Mass. 39.

[29] 1887, ch. 270.

[30] Per Field, C. J., in the principal case, pp. 211, 212. The judgment in the former action, however, was held conclusive upon the whole cause of action for personal injuries.

[31] Stat. 1887, ch. 270.

[32] Clark v. New York, P. & B. R. Co., 160 Mass. 39, 42; 35 N. E. 104, citing Ramsdell v. New York & N. Eng. R., 151 Mass. 245, and Dacey v. Old Colony R., 153 Mass. 112, 118. The following is substantially the opinion in the last decision: The plaintiff considers that he cannot maintain an action under Pub. Stat. ch. 112, sec. 212, amended by Stat. 1883, ch. 243, because the negligence set forth was only that of a fellow servant of the plaintiff's intestate, and his intestate, if he had survived, could not have maintained an action. It is also plain that no recovery could be had by the present plaintiff as administrator under the Employer's Liability Act, Stat. 1887, ch. 270, because where, as in this case, death resulted without conscious suffering, the only action that can be maintained is in the name of the widow or dependent next of kin. Ramsdell v. New York & New Eng. R., 151 Mass. 245; 23 N. E. 1103. But the plaintiff contends that the combined effect of both statutes is to give an action to the administrator, free from defenses arising out of the relation of fellow servant, in a case where death has resulted without conscious suffering, and where there is no widow nor dependent next of kin. We do not think so. The right of action, in addition to those already existing, which are given by the Employer's

§ 911. Instantaneous death—Conscious suffering—Massachusetts decisions and opinions—Continued.—Where a brakeman was knocked off the train by contact with a bridge and his skull broken in, it was determined that he died instantly or without conscious suffering.[33] But where the deceased died from suffocation, the court said: "From the situation in which Pierce's body was found, it may be inferred that his death was not instantaneous, and that he lived in a state of conscious suffering for a greater or less time, even if that might not be presumed in most cases of death by suffocation.[34] If that suffering was

Liability Act, are limited to the cases specified in that act. It could not have been intended that where an employee is instantly killed, and dies without conscious suffering, the widow or next of kin shall have a right of action for the death, under the employer's act, and that the administrator also, by virtue of the same statute, shall be enabled to maintain an action for the death, which could not otherwise be maintained under the Statute of 1883. We are of the opinion that the Stat. 1887, ch. 270, cannot be invoked to relieve a case brought under Stat. 1883, ch. 243, on the defense that the injury was caused by the negligence of a fellow servant. Section 2, of the first mentioned statute, which gives a remedy to the widow or next of kin, instead of to the administrator, where death results without conscious suffering, must be held to be exclusive as to cases of death where the aid of that statute is invoked. See Ramsdell v. New York & N. E. R. Co., 151 Mass. 245; 23 N. E. 1103. We are of opinion that, since the passage of this statute, as well as before, no action can be maintained under Pub. Stat. ch. 112, sec. 212, as amended by Stat. 1883, ch. 243, where the death of an employee was caused by negligence of the fellow servant. Dacey v. Old Colony Railroad Co., 153 Mass. 112, 117; 26 N. E. 437, 439.

[33] Maher v. Boston & A. R. Co., 158 Mass. 36; 32 N. E. 950. In Riley v. Connecticut River R. Co., 135 Mass. 292, the accident causing death was much the same, and it was held that the evidence must show that death was instantaneous. In Mears v. Boston & M. R., 160 Mass. 150; 39 N. E. 997, it was decided that the evidence showed that deceased died without conscious suffering. In Hodnett v. Boston & A. R. Co., 156 Mass. 86; 30 N. E. 224, under ch. 270, sec. 2, deceased was picked up unconscious, having been struck on the head with sufficient force to cause blood to gush from his nose and mouth, and he expired about two hours thereafter. There was, however, no evidence whether or not he regained consciousness, although the actual facts might have been proven. Held not sufficient to show that he died without conscious suffering.

[34] Citing Nourse v. Packard, 138 Mass. 307. In this case there was expert evidence that deceased would have survived from three to five minutes, and he died from suffocation; it was decided that death was not instantaneous.

caused by the defendant's wrong, difficulty in estimating the damages is not a reason for its paying none."[35] Again, it is decided that until the Statute of 1887, ch. 270, there was no law under which the widow or next of kin could recover at all for the death of her husband or relative. "The meaning obviously is that the right of action given in the first part of section 2 shall not be affected by the fact that the deceased died instantaneously or without conscious suffering. The words last quoted cannot point to a standard for the measurement of damages. No such standard exists under the circumstances and conditions to which they profess to refer. Section 1 of the statute is to be construed as giving a right of action to the employee in case of death, to his legal representative suing in his right. Section 2, as giving a right of action to the widow and next of kin, without indicating anything as to the mode of assessing damages; and section 3, as settling the amount to be recovered, first in cases under section 1, and secondly in cases under section 3."[36] In Mulcahey v. Washburn C. W. Co.,[37] it was declared that "instantaneous death and absence of conscious suffering after a fatal injury are readily distinguishable, and have been distinguished in our decisions. The continuance of life after accident, and not insensibility or want of consciousness, is the test by which it is determined whether a cause of action survives.[38] But as the plaintiff can recover only such damages as she can show were sustained by her intestate, if he became instantly insensible, and so remained until his death, nothing can be recovered for any physical or

[35] Pierce v. Cunard Steamship Co., 153 Mass. 87, 90, 91; 26 N. E. 415.

[36] Ramsdell v. New York & New England Railroad Co., 151 Mass. Rep. 245, 249, 250; 23 N. E. 1103; 7 L. R. A. 154. But in Brown v. Chicago & N. W. R. Co., 102 Wis. 137; 77 N. W. 748; 44 L. R. A. 579; 13 Am. & Eng. R. Cas. N. S. 603; 5 Am. Neg. Rep. 255, 265, rehearing denied 78 N. W. 771; 13 Am. & Eng. R. Cas. N. S. 603; 44 L. R. A. 585, the court, Marshall, J., says: "The length of time he survived the injury is not stated, and is not material except as to the damages recoverable, and that does not go to the cause of action," citing Bancroft v. Boston, etc., R. Co., 11 Allen (Mass.), 34; Hollenbeck v. Berkshire R. Co., 9 Cush. (Mass.) 478; Tully v. Fitchburg R. Co., 134 Mass. 499; Chandler v. Railroad Co., 159 Mass. 583; 35 N. E. 89; Corcoran v. Railroad Co., 133 Mass. 507; Kellow v. Railway Co., 68 Iowa, 470; 23 N. W. 740; 27 N. W. 466.

[37] 145 Mass. 281, 285, 286; 14 N. E. 106; 1 Am. St. Rep. 450; 5 N. Eng. 289.

[38] Citing Hollenbeck v. Berkshire, 9 Cush. (Mass.) 478.

mental suffering sustained by him; nothing can be recovered by the administrators on account of the death which subsequently ensued."[39] Again, it is declared that "all the evidence tended to show that the intestate remained in a perfectly unconscious state ever after he was struck, so that nothing could be recovered for physical or mental suffering; and there was no evidence of any considerable expense or loss incurred between the time he was struck and his death.[40] Bodily mutilation was not an element of damage to the intestate; he had received his death blow, and ever after remained unconscious."[41] It was decided in 1871, that it was not necessary[42] that death be instantaneous in order to recover damages against a street railway corporation.[43] And where deceased did not expire for fifteen minutes after the injury, although he remained unconscious, it was decided that the right of action became vested in him and survived for the damages which had been occasioned to him.[44] So under the Statute of 1842,[45] it is determined that the recovery for death by collision on a railroad did not depend upon consciousness, mental capacity or intelligence after the accident and injury to deceased.[46]

[39] The syllabus to the Mulcahey case is as follows: "In an action for personal injuries occasioned to the plaintiff's intestate by the breaking of a machine upon which he was employed by the defendant, the evidence showed that the intestate was found, about ten minutes after the accident, with his body crushed and his bowels disrupted, and that, although breathing, he was unconscious, and died almost immediately in that state. The judge ruled that there was evidence to warrant the jury in finding that a cause of action accrued to the intestate in his lifetime, and survived to his personal representative; that there was no evidence to warrant the jury in finding that the deceased had endured any conscious pain or suffering, and that the plaintiff was only entitled to recover nominal damages. Held, that the rulings were not inconsistent, and were correct. There was also in this case no evidence of any expense or loss incurred, before death, by reason of the accident, which in itself might afford ground for substantial damages.

[40] Citing Kennedy v. Standard Sugar Refinery, 125 Mass. 90.

[41] Tully v. Fitchburg R. Co., 134 Mass. 499, 504, 505.

[42] Under Stat. 1864, ch. 229, sec. 37; Gen. Stat. ch. 127.

[43] Commonwealth v. Metropolitan R. Co., 107 Mass. 236.

[44] Bancroft v. Boston, etc., R. Co., 11 Allen (Mass.), 34.

[45] Ch. 81, 89, sec. 1.

[46] Hollenbeck v. Berkshire R. Co., 9 Cush. (Mass.) 478; Kearney v. Boston & W. R. Co., 9 Cush. (Mass.) 108.

CHAPTER XXXVIII.

RELEASES.

§ 912. Who may release.
913. Release by injured person.
914. Release by administrator or executor.
915. Release by parents.
616. Release or settlement with widow.
917. Acceptance by widow of benefits from relief association —Release.
918. Release by husband where others are entitled.
919. Revival by mother as executrix of action for personal injuries—Effect of.
920. Payment to administrator's attorney.
921. Release cannot be varied by parol evidence.
922. Employee cannot by contract deprive widow and children of right.
923. Free pass—Carrier—Contract exempting from liability.
924. Barred by lapse of time.
925. Recovery against employer bars action on insurance policy to him.
926. Recovery for personalty injured in collision no bar to action for death.
927. Effect of defeat of one party in separate action on recovery of others.
928. Settlement of action for assault no bar.
929. Judgment recovered by personal representative bars husband's recovery for loss of society.
930. Failure to apportion damages —When not ground for reversal.
931. Remittitur of damages.

§ 912. Who may release.—A release, to be binding on the persons entitled to sue for the death of another, must be by one who has authority at the time to bring the action.[1] So a release by an administrator, executed prior to his appointment, will not operate as a release of the claim or a bar to the action, though in such a case the defendant may show that money paid in pursuance of such release was used for funeral and burial expenses, and he may be credited with the same in estimating the damages.[2] And it is declared that the authority given for bringing and prosecuting the action, in the name of any one or more of the persons entitled for the benefit of all, does not give the nominal

[1] Stuber v. McEntee, 142 N. Y. 200; 58 N. Y. St. R. 455; 36 N. E. 878, rev'g 47 N. Y. St. R. 294.

[2] Stuber v. McEntee, 142 N. Y. 200; 58 N. Y. St. R. 455; 36 N. E. 878, rev'g 47 N. Y. St. R. 294.

plaintiff or plaintiffs power to compromise or to release the rights of the other beneficiaries, or to lessen or alter the shares awarded by the jury.[3] So it has been thus decided, in an action by a widow suing for herself and also for the benefit of the children and parents of the deceased.[4] But in other cases it has been held that one who is entitled to sue, for the benefit of himself and others having a subordinate right, may execute a release conclusive on all.[5] And it is held that an executor or administrator may compromise or settle such a claim.[6] So in Minnesota, it has been decided that the personal representative may so act before or after the action is brought and without the consent of the next of kin or the probate court.[7] And all the parties entitled to recover may execute a release which will be binding on the personal representative.[8]

§ 913. Release by injured person.—It is a rule, which has been generally affirmed by the decisions, that if an injured person executes during his lifetime a compromise or release of all demands against the one responsible for his injuries, or recovers from such person a judgment in satisfaction therefor, it will, where he subsequently dies from such injuries, operate as a bar to an action under the statute for his death.[9] Although, if de-

[3] Southern Pac. R. Co. v. Tomlinson, 163 U. S. 369; 41 L. Ed. 193; 16 Sup. Ct. R. 1171, per Mr. Justice Gray.

[4] Southern Pac. R. Co. v. Tomlinson, 163 U. S. 369; 41 L. Ed. 193; 16 Sup. Ct. 1171. But see Greenlee v. Eastern Tenn. V. & G. R. Co., 5 Lea (Tenn.), 418.

[5] Holder v. Nashville, etc., R. R. Co., 92 Tenn. 142; 20 S. W. 537.

[6] Hartigan v. Southern Pac. Co., 86 Cal. 142; 24 Pac. 851.

[7] Foot v. Great Northern Ry. Co., 81 Minn. 493; 84 N. W. 342; 52 L. R. A. 354. See Minn. Gen. Stat. 1894; sec. 5913, providing that the personal representative may recover for the injury, where death is caused by wrongful act.

[8] Guldager v. Rockwell, 14 Colo. 459; 24 Pac. 556; Sykora v. Case Mach. Co., 59 Minn. 130; 60 N. W. 1008. But see Yelton v. Evansville & T. H. R. R. Co., 134 Ind. 414; 33 N. E. 629.

[9] Southern Bell Teleph. & Teleg. Co. v. Cassin, 111 Ga. 575; 36 S. E. 881; Western & A. R. Co. v. Strong, 52 Ga. 461; Hecht v. Ohio & M. R. Co., 132 Ind. 507; 32 N. E. 302; 54 Am. & Eng. R. Cas. 75; Whitford v. Panama R. R. Co., 23 N. Y. 484; Dibble v. N. Y. & Erie R. R. Co., 25 Barb. (N. Y.) 183; Solor Refining Co. v. Elliott, 15 Ohio C. C. 581; Hill v. Penn. R. R. Co., 178 Pa. 223; 35 Atl. 997; 35 L. R. A. 196; 39 W. N. C. 221; Price v. Richmond & D. R. Co., 33 S. C. 556; 12 S. E. 413;

ceased was mentally incompetent when he executed the release, evidence is properly admitted that plaintiff did not intend to ratify such release, even though she had used the money.[10] And where there is a stipulation for continuance, and that the action shall not abate, and a waiver of accord and satisfaction, and the injured party dies before judgment, the beneficiaries are not entitled to the benefit of such judgment, and in addition thereto their statutory action, but the stipulation and judgment operate as an accord and satisfaction extinguishing the beneficiaries' right of action.[11]

§ 914. Release by administrator or executor.—An administrator may settle for a less sum than the damages demanded in the action.[12] But if an administrator is not appointed at the instance of the widow or next of kin, nor with their approbation, he cannot, to their exclusion, release a cause of action for wrongful or negligent death, where the statute makes the damages recovered the property of such beneficiaries, especially where the administrator was appointed in another state and it was alleged in the replication that the release was based upon a fraudulent design.[13] An executor may, however, compromise where the statute permits of such act with the approval of the probate court.[14]

§ 915. Release by parents.—Where a release is given by the parents of a deceased son, and they were his sole heirs at law, such release will be a bar to an action for the death by an administrator subsequently appointed, where there are no claims against decedent.[15]

Brown v. Chattanooga Electric R. Co., 101 Tenn. 252; 47 S. W. 415; Read v. Great Eastern Ry. Co., 9 B. & S. 714; 37 L. J. Q. B. 278; L. R. 3 Q. B. 555; 18 L. T. 82; 16 W. 1040. See Littlewood v. Mayor, 89 N. Y. 424, rev'g Schlichting v. Wintgen, 25 Hun (N. Y.), 626; Coyle v. Great Northern Ry. Co., 20 L. R. Ir. 409; Wright v. Midland Ry., 51 L. T. 539. But see Southern Ry. Co. v. Sullivan, 59 Ala. 272.

[10] Missouri, K. & T. R. Co. of Tex. v. Brantley (Tex. Civ. App. 1901), 62 S. W. 94.

[11] McGahey v. Nassau Elec. R. R. Co., 166 N. Y. 617; 59 N. E. 1106, aff'g 51 App. Div. 281; 64 N. Y. St. R. 965.

[12] Hencher v. Chicago, 41 Ill. 136.

[13] Pisano v. B. M. & J. F. Shanley Co. (N. J. 1901), 48 Atl. 618.

[14] Hartigan v. Southern P. R. Co., 86 Cal. 142; 24 Pac. 851; Cal. Code Civ. Proc. sec. 1588.

[15] Christie v. Chic. R. I. & P. R.

§ 916. Release or settlement with widow.—An accord and satisfaction made by the widow alone will be a bar to an action by the personal representative of the deceased, under a statute conferring such a right of action upon him for the benefit of the widow.[16] And he cannot attack such release on the ground that it was procured by fraud, the right to so attack it being in the widow alone.[17] And under a statute creating a right of action in favor of the widow, in part for the benefit of the children, a compromise by her and her bona fide receipt of the money thereunder will bind the children.[18] But in Nebraska it has been decided that a release by a widow will not bar an action by her as administratrix for her children.[19] And it has been held in England that an action by a widow for damages for injuries to her husband's property, resulting from his death, is not barred by a judgment recovered by her as administratrix for damages for his death.[20]

§ 917. Acceptance by widow of benefits from relief association—Release.—The execution of a release and the acceptance by a widow of benefits from an employees' relief association, of which her husband was a member, and the by-laws of which require a release to the company to be executed before the payment of such benefits, will not bar an action by her as administratrix of her husband's estate.[21]

§ 918. Release by husband where others are entitled.—The

Co., 104 Iowa, 707; 74 N. W. 697. See Sterebling v. Marshall, 2 Civ. Proc. (N. Y.) 77; 10 Daly (N. Y.), 406.

[16] Prater v. Tennessee Producers Marble Co., 105 Tenn. 496; 58 N. W. 1068. See Natchez C. M. Co. v. Mullins, 67 Miss. 672; 7 So. 542.

[17] Prater v. Tennessee Producers Marble Co., 105 Tenn. 496; 58 N. W. 1068. See Stephens v. Nashville, etc., R. Co., 10 Lea (Tenn.), 448.

[18] McNamara v. Slavens, 76 Mo. 329; Smalling v. Kreech (Tenn. Ch. App.), 46 S. W. 1019; Schmidt v. Deegan, 69 Wis. 300.

[19] Chic. B. & Q. R. Co. v. Wymore, 40 Neb. 645; 58 N. W. 1120.

[20] Barnett v. Lucas, Ir. R. 6 C. L. 247; 10 Mew's Eng. Dig. (1898) p. 106. See also Leggett v. Great Northern R. Co., 45 L. J. Q. B. 557; 1 Q. B. D. 599; 35 L. T. 334; 24 W. R. 784; Daly v. Dublin, W. & W. R., 30 L. R. Ir. 514; Guldager v. Rockwell, 14 Colo. 459; 24 Pac. 556.

[21] Cowen v. Ray, 108 Fed. 320; 47 C. C. A. 352; Baltimore & O. R. Co. v. McCarney, 12 Ohio C. C. 543; 1 Ohio C. D. 631. See also Chic. B. & Q. R. Co. v. Maney, 55 Ill. App. 588; Maney v. Chic. B. & Q. R. Co., 49 Ill. App. 105.

husband cannot by a release exclude others who are entitled to a recovery.[22]

§ 919. Revival by mother as executrix of action for personal injuries—Effect of.—An action by a mother, in her individual capacity, against her son's employers for damages for his death, will be barred by the revival in her name, as his executrix, of an action commenced by him against such employers for his personal injuries.[23]

§ 920. Payment to administrator's attorney.—In an action by administrators, who allege in their complaint that letters were generally issued to them, but who were in fact merely empowered to prosecute the claim, it has been decided that a part payment, made in good faith by the defendant to the attorney for the plaintiffs in satisfaction of the judgment, will be credited to the defendant to that extent upon the same.[24]

§ 921. Release cannot be waived by parol evidence.—Parol evidence showing additional consideration is not admissible to vary the terms of a written release which is contractual in character.[25]

§ 922. Employee cannot by contract deprive widow and children of right.—Although it has been stated generally that a person injured may execute a release or compromise for injuries received by him which will be a bar to an action for his death,[26] it has, however, been decided in Illinois that where a right of action is conferred upon a widow and next of kin for wrong-

[22] South & N. A. R. Co. v. Sullivan, 59 Ala. 272. See Davis v. St. Louis, I. M. &. S. R. Co., 53 Ark. 117; 13 S. W. 801, as to others entitled.

[23] Wood v. Gray H. L. Sc. (1892), A. C. 576.

[24] Tito v. Seabury, 18 Misc. (N. Y.) 283; 41 N. Y. Supp. 1041.

[25] Milich v. Armour Packing Co., 60 Kan. 229; 56 Pac. 1, wherein it was so held in the case of a release which acknowledged the receipt of a certain sum of money in satisfaction of all claims for death of a father, and in which the releasor agreed to make diligent effort to secure the release of his mother for a certain sum, it being provided that if the mother was dead and he was the only next of kin, and her sole representative, the amount to be offered to her should be received by him as consideration for her release.

[26] See sec. 913, herein.

fully causing a person's death,[27] they cannot be deprived of such right by a contract between the deceased, an employee, and his employer.[28] And, in Indiana, the right of action for death, conferred by statute upon the representative of the deceased for the benefit of the latter's wife and children or next of kin,[29] is a new and independent right of action, of which they cannot be deprived by an agreement of deceased that the acceptance of benefits from his employer's relief department shall operate as a release of the company.[30] But where, in such a case, the release of the injured person is pleaded in bar, it has been decided that the effect of such release may be avoided by proof of incapacity, imposition or duress.[31] And the mere fact that an action by the injured person was pending at the time of his death will not operate as a bar to an action under the statute for the damages resulting from such death.[32]

§ 923. Free pass—Carrier—Contract exempting from liability.—Where a statute confers a right of action, in case of wrongful or negligent killing, upon the widow and children of deceased for the loss resulting to them, a contract by a passenger to exempt the carrier from liability for negligent injuries to him, in consideration of free transportation, will not deprive the widow and children of their right under the statute to maintain such action.[33]

§ 924. Barred by lapse of time.—Under a statute providing that an action for death shall be commenced within a certain period of time after such death has occurred, a cause of

[27] Ill. Rev. Stat. ch. 70, secs. 1, 2.

[28] Maney v. Chic. B. & Q. R. Co., 49 Ill. App. 105; Ill. C. R. Co. v. Cozby, 69 Ill. App. 256.

[29] Horner's (Ind.) Rev. Stat. 1897, sec. 284.

[30] Pittsburg, C. C. & St. L. R. Co. v. Hosea, 152 Ind. 412; 14 Am. & Eng. R. Cas. N. S. 692; 1 Repr. 896; Robinson v. Canadian Pac. R. Co. (1892), App. Cas. 481, rev'g 19 Can. S. C. 292; 15 Mont. Leg. News, 70.

[31] Price v. Richmond & D. R. Co., 38 S. C. —; 17 S. E. 752; *S. C.*, 33 S. C. 556; 12 S. E. 413; 26 Am. St. R. 700.

[32] Chic. & Eastern Ill. R. R. Co. v. O'Connor, 119 Ill. 586; 9 N. E. 263; International & G. N. R. Co. v. Kuehn, 70 Tex. 582; 23 N. E. 564.

[33] Adams v. Northern Pac. R. Co. (U. S. C. C. Wash.), 95 Fed. 938; 15 Am. & Eng. R. Cas. N. S. 784.

action will be barred where it is not commenced within the period designated.[34]

§ 925. Recovery against employer bars action on insurance policy to him.—Where an insurance policy to an employer provides, in case of the death or injury of employees or other designated persons, for payment therefor to him "for the benefit of the injured person or persons or their legal representatives in case of death," a right of action, on such policy for the death of an employee, will be barred by a recovery against the employer therefor.[35]

§ 926. Recovery for personalty injured in collision no bar to action for death.—Where by statute an administrator may recover damages for the death of the intestate, such recovery is not barred by the fact that the administrator has previously obtained a judgment for the value of the horse and wagon which was destroyed in the collision in which the intestate was killed.[36]

§ 927. Effect of defeat of one party in separate action on recovery of others.—Where one of the parties entitled to sue for the death of a person brings an action therefor, in which he is defeated, the jury in a subsequent action by the others should not consider, in estimating the amount recoverable, any damages sustained by the former.[37]

§ 928. Settlement of action for assault no bar.—The settlement and dismissal of an action for assault has been decided to be no bar to an action by the plaintiff's widow to recover damages for death caused by assault.[38]

[34] Stoltz v. Baltimore & O. R. Co., 7 Ohio Dec. 514. See Ohio Rev. St. sec. 6135, providing that action shall be commenced within two years.

[35] Embler v. Hartford Steam Boiler Insp. & Ins. Co., 158 N. Y. 431; 44 L. R. A. 512; 53 N. E. 212, aff'g 8 App. Div. (N. Y.) 186; 40 N. Y. Supp. 450.

[36] Peake v. Baltimore & O. R. Co., 26 Fed. 495. See Ohio Rev. St. secs. 6135, 6143, which provide for recovery for death.

[37] Galveston, H. & S. A. R. Co. v. Kutac, 72 Tex. 643; 11 S. W. 127.

[38] Donahue v. Drexler, 82 Ky. 157.

§ 929. Judgment recovered by personal representative bars husband's recovery for loss of society.—A recovery of a judgment by the personal representative of deceased for the benefit of her estate will, it has been decided in Kentucky, operate as a bar to an action by the husband for the loss of her society, as it is declared the former is more advantageous to him than his common-law right of action for loss of her society.[39]

§ 930. Failure to apportion damages—When not ground for reversal.—In an action by a father and mother, who are the sole plaintiffs, for the death of a minor child, the fact that the jury failed to apportion the damages between them, as a statute requires in death suits,[40] is not ground for reversal, as a satisfaction of the judgment in the parent's favor will bar any other action by either of them.[41]

§ 931. Remittitur of damages.—Where a remittitur is filed by the plaintiff of record, which reduces to nominal damages the sums awarded to some of the other persons entitled thereto, a judgment, apportioning the damages as thus unlawfully fixed, instead of as fixed by the jury, may be objected to by the defendant, as he is thereby open to the danger of another suit by these persons.[42]

[39] Louisville & N. R. Co. v. McElwain, 98 Ky. 700; 34 S. W. 236; 34 L. R. A. 788; 3 Am. & Eng. R. Cas. N. S. 309; 18 Ky. Law Rep. 379.

[40] Tex. Rev. Stat. art. 2909.

[41] Gulf, C. & S. F. R. Co. v. Burleson (Tex. Civ. App.), 26 S. W. 1107. See note to sec. 900, herein, as to apportionment.

[42] Southern Pac. R. Co. v. Tomlinson, 163 U. S. 369; 41 L. Ed. 193; 16 Sup. Ct. 1171.

TITLE VI.

SHIPPING AND ADMIRALTY.

CHAPTER XXXIX.

ADMIRALTY—PERSONAL INJURIES AND DEATH.

§ 932. Damages for causing personal injury or death—Admiralty—General remarks.
933. Injuries to seamen—Damages.
934. Same subject continued.
935. Personal injuries.
936. Death—Jurisdiction of subject-matter—Power to determine damages.
937. Death—Decisions allowing actions for damages.
938. Death—No action or recovery in absence of statute.
939. Same subject continued—Negative rule extended.
940. Same subject continued—Negative rule extended—Federal decision—Hawaiian law.
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942. Death—Waters within state—Action for damages.
943. Death—Owners residing in state—Action for damages.
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946. Death—Survival of action—Libel in rem—Statutory lien—Damages.
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948. Death—Libel in rem—Statutory lien—Action for damages—Waters within state.
949. Death—Absence of statute giving lien—Deduction of moiety of damages.
950. Death without the state.
951. Death—Foreign law and foreign vessel.
952. Death—State courts—Maritime liens.
953. Death—Negligence and contributory negligence—Defenses—Division of damages.
954. Death—Liability for one half the damages—Offset where losses are even.
955. Personal injury—Death—Limited Liability Act.

§ 932. Damages for causing personal injury or death—Admiralty—General remarks.—Causes of action for personal injuries and for death occasioned by wrongful or negligent

act or omission, etc., and the damages recoverable for such losses, have been fully considered under the preceding chapters, in so far as the governing principles in relation to damages are concerned, and this irrespective of the fact whether or not the personal injury or death was caused by negligence upon the high seas or elsewhere. It remains therefore to consider here only the general question of jurisdiction of admiralty over those actions, the limitation of liability act and such other matters as are not discussed under the preceding chapters, and which more properly belong under this division of the subject.

§ 933. Injuries to seamen—Damages.—A right of action lies in personam even upon an amended libel to recover damages, where one goes on a vessel under shipping articles and is forced by the master to leave the ship at a distant port without payment, and where he is otherwise mistreated and suffers other wrongs and injuries.[1] Again, the general rule is that seamen may recover damages for assault and battery by the officers, in cases of cruel and clearly excessive or immoderate punishment, or where it is wanton and malicious, or a deadly weapon was used, and in certain other cases, and an action lies in the home port to recover damages therefor, which will be commensurate with the injury,[2] although it is decided that the commander in the navy of a squadron is the judge of the degree of punishment necessary to suppress a spirit of disobedience and insubordination and that he is not liable for a mere error of judgment, even if the jury supposes that milder measures would have accomplished his object. He is bound, however, at the same time never to inflict any severer punishment than he conscientiously believes to be necessary to maintain discipline and due subordination in his ships, and the questions whether he acted with the sole intention to maintain discipline or was actuated by a spirit of vindictiveness or malice are for the jury,

[1] Davis v. Adams (U. S. C. C. A. Cal.), 42 C. C. A. 493; 102 Fed. 500, rev'g 93 Fed. 977.

[2] Desty on Shipping & Admiralty (ed. 1879), sec. 156, citing Forbes v. Parsons, Crabbe, 283; Dinsman v. Wilkes, 12 How. 390; Fuller v. Colby, 3 Woodb. & M. 10; Brown v. Howard, 14 Johns. (N. Y.) 122; Anderson v. Ross, 2 Sawy. (U. S.) 91; Reed v. Canfield, 1 Sumn. (U. S.) 195, and numerous other cases. See also Grimley v. Hawkins (U. S. D. C. S. D. Ala.), 46 Fed. 400.

under all the circumstances.[3] Again, admiralty and state courts have concurrent jurisdiction of an action for damages for neglect of a sick seaman.[4]

§ 934. Same subject continued.—Where the master's act in inflicting blows upon a seaman with his fists for failure to obey orders is not malicious, and there is no evidence of excessive punishment, the seaman cannot recover damages.[5] Although some compensation is recoverable for unnecessary suffering and neglect of a cook, who is left without any attention after being put in irons and thrown down a hatch. The amount will, however, be reduced by the cook's improper conduct in retaliating for an assault upon him by the captain by attacking the latter with a deadly weapon.[6] And where there is continued abusive treatment of a seaman, the vessel is liable in damages where the captain ought to have prevented such treatment.[7] Again, where the master failed to proceed to the nearest available port to enable a mate of the schooner, who had had his leg broken without fault of anyone, to receive the proper care and attention, but took said mate to another and distant port, and from there sent him to another and more distant port, occasioning thereby additional pain and rendering the injury permanent, it was decided that the owners were liable in damages therefor.[8] If, however, the injury to a seaman is received while obeying proper orders, not involving any extraordinary or unusual risk, it seems that damages are not recoverable therefor,[9] although it is not contributory negligence for a seaman to obey orders at sea, even though he has knowledge of the danger.[10]

§ 935. Personal injuries.—It has been decided that the common-law rule that an action by a husband for injuries to

[3] Dinsman v. Wilkes, 12 How. (U. S.) 389.

[4] Moseley v. Scott (Ohio, 1865), 5 Am. L. Reg. N. S. 599.

[5] Stout v. Weedin (U. S. D. C. D. Wash.), 95 Fed. 100. As to 16th admiralty rule, see The Marion Chilcott (U. S. D. C. D. Wash.), 95 Fed. 688.

[6] The Fred E. Sander (U. S. D. C. D. Wash.), 95 Fed. 829.

[7] The Marion Chilcott (U. S. D. C. D. Wash.), 95 Fed. 688.

[8] Whitney v. Olsen (U. S. C. C. A. Cal.), 47 C. C. A. 331; 108 Fed. 292.

[9] The Pegasus (U. S. D. C. D. Or.), 96 Fed. 623.

[10] Keating v. Pacific S. W. Co., 21 Wash. 415; 58 Pac. 224.

his wife abates with his death does not apply in admiralty.[11] And also that the Federal courts have not exclusive jurisdiction of actions for personal injuries.[12] But recovery cannot be had by libellants intervening after release of the vessel on stipulation under the original libel.[13] Again, the amount of damages recoverable for personal injuries may include actual, but not prospective, expenses.[14] And where a collision between two vessels results from the fault of both of them, a party sustaining injuries from the collision may recover damages against both vessels, and they may be proceeded against in the same libel. The damages recovered in such case may be apportioned by the decree equally between the two vessels; and at the same time the right be reserved to the libellant to collect the entire amount of either of them, in case of the inability of the other to respond to her portion.[15] And the fact that the injured person's negligence contributed to the injury does not bar him of all recovery of damages in admiralty.[16] So the rule of apportionment of damages in admiralty applies to the case of personal injuries sustained by a grain inspector while inspecting the vessel, it appearing that he was not entirely free from fault.[17] Again, where masters and owners failed to comply with the Act of 1838,[18] providing for the better security of lives of passengers on board vessels propelled wholly or in part by steam, they were liable to the penalty therein specified to be recovered by suit or indictment.[19] Outside, however, of such exceptions as are pe-

[11] The Sea Gull, Chase (U. S.), 145; Fed. Cas. No. 12,578. See also Plummer v. Webb, 1 Ware (U. S.), 69; Fed. Cas. No. 11,234. But see Crapo v. Allen, 1 Sprague (U. S.), 184; Fed. Cas. No. 3660. See Grimley v. Hawkins (U. S. D. C. S. D. Ala.), 46 Fed. 400; The Garland, 5 Fed. 924, which was an action for the loss of a son's services.

[12] Billings v. Breinig, 45 Mich. 65; 7 N. W. 772.

[13] The Williamette (U. S. C. C. A. 9th C. N. D. Wash.), 18 C. C. A. 366; 44 U. S. App. 26; 31 L. R. A. 715. See The T. W. Snook, 51 Fed. 244.

[14] The Lizzie Frank (U. S. D. C. S. C. Ala.), 31 Fed. 477.

[15] The Washington & The Gregory, 9 Wall. (U. S.) 513. See the Victory, 68 Fed. 400; The Max Morris, 137 U. S. 1, 9; The Sterling & The Equator, 106 U. S. 647, and citations in Russell & Winslow's Syl. Dig. U. S. Supreme Ct. Rep. p. 4530.

[16] The Max Morris, 137 U. S. 1. See Paxson v. Cunningham, 63 Fed. 134.

[17] The City of Naples (U. S. D. C. D. Minn.), 61 Fed. 1012.

[18] Act, July 7, 1838; 5 Stat. at L. 304. See Act, 1843; 5 Stat. at L. 626.

[19] Waring v. Clarke, 5 How. (U. S.

culiar to the maritime or admiralty law, or which arise under the acts of Congress, and to which we have given consideration under this title of shipping and admiralty, it may be stated generally that where the courts of admiralty have entertained jurisdiction of actions for recovery for personal injuries,[20] substantially the same rules for the admeasurement of damages have been applied as those heretofore considered under the chapters herein relating to personal injuries. The reader is, therefore, referred to the same.

§ 936. Death—Jurisdiction of subject-matter—Power to determine damages.—If the court has jurisdiction of the steamer and the collision which is the subject-matter of the action, it is competent to decide whether under the circumstances it may estimate the damages which one person has sustained by the wrongful or negligent killing of another.[21]

§ 937. Death—Decisions allowing action for damages.—If the tort is by its nature and locality maritime, and such as is within the ancient jurisdiction of the United States district

1847) 441. See The City of Washington, 92 U. S. 31, 36.

[20] That admiralty has jurisdiction and that recovery can be had in case of personal injuries, see The Strabo (U. S. C. C. A. N. Y. 1900), 39 C. C. A. 375; 98 Fed. 998, aff'g 90 Fed. 110; Grimsley v. Hawkins (U. S. D. C. Ala. 1891), 46 Fed. 400; Hermann v. Port Blakely Mill Co. (U. S. D. C. Cal., 1895), 69 Fed. 646; The Kirkland, 3 Hughes (U. S. 1879), Fed. Cas. No. 4181; Mendell v. The Martin White (U. S. 1856), Fed. Cas. No. 9419; Plummer v. Webb, 1 Ware (U. S. 1825), 69; Fed. Cas. No. 11,234. When admiralty has not jurisdiction and there can be no recovery, see Holmar v. The Miami (U. S. D. C. Ala. 1896), 78 Fed. 818; Anderson v. The Mary Garrett (U. S. D. C. Cal. 1894), 63 Fed. 1009; The H. S. Pickands (U. S. D. C. Mich. 1890), 42 Fed. 239; The Mary Stewart (U. S. D. C. Va. 1881), 10 Fed. 137; Barrett v. Luther, 1 Curt. (U. S. 1853), 434; Fed. Cas. No. 1025; Murray v. Donnelly (U. S. 1846), Fed. Cas. No. 9958. When vessel liable, see The Calista Hawes (U. S. D. C. N. Y. 1882), 14 Fed. 493. When one suit is a bar, see The Mabel Commeaux (U. S. C. C. La. 1885), 24 Fed. 490. See further as to jurisdiction and recovery for personal injuries, The Egyptian Monarch (U. S. D. C. N. J. 1888), 36 Fed. 773; The Daylesford (U. S. D. C. Ala. 1887), 30 Fed. 633; The Clatsop Chief (U. S. D. C. Or. 1881), 8 Fed. 767; Todd v. The Tuchen (U. S. D. C. Pa. 1880), 2 Fed. 600.

[21] Gordon, Ex parte, 104 U. S. 515; 26 L. Ed. 814. See Detroit R. Ferry Co., Ex parte, 104 U. S. 519; 26 L. Ed. 815; Ferry Co., Ex parte, id.

court, an action for death by collision can be maintained for a recovery of damages, whether or not it is aided by state or Federal legislation,[22] and the pecuniary loss suffered by those who had a legal right to support from the deceased can be recovered in admiralty, though the wrong was that of a vessel upon the high seas.[23]

§ 938. Death—No action or recovery in absence of statute.—The question as to the right to maintain an action in admiralty to recover damages for losses occasioned by death of a human being upon the high sea or upon waters navigable from the sea, when caused by wrongful or negligent act, etc., has been the subject of much discussion in the courts. In 1886, however, the United States supreme court decided that such a right did not exist in the absence of a state statute or act of Congress giving the same.[24] This decision was cited and followed in 1888, in another case in the same court,[25] and it has been cited, followed or considered upon this point in other cases.[26] It will be observed, however, that this adjudication is of a negative character, in that it holds that the action does not lie independently of a statute conferring the right, while the question whether a suit in rem could be maintained was not decided as the time limit within which a suit could be brought had expired.[27] In Butler v. Boston Steamship Co.,[28] the 1886

[22] The city of Norwalk (U. S. D. C. N. Y. 1893), 55 Fed. 98, modified 9 C. C. A. 521; 61 Fed. 364.

[23] The Columbia (U. S. D. C. N. Y. 1886), 27 Fed. 704. See also Boden v. Demwolff (U. S. D. C. E. D. La.), 56 Fed. 846; Long Island, North Shore P. & F. Tr. Co., In re (U. S. D. C. N. Y. 1881), 5 Fed. 599. It was held in 1880 that even though no action could be maintained in the common law, it could be brought in admiralty. Holmes v. Oregon & C. R. Co., 5 Fed. 75; The Garland, 5 Fed. 924.

[24] The Harrisburg, 119 U. S. 199; 7 Sup. Ct. 140; 30 L. Ed. 358 (App. from C. C. U. S. E. D. Pa.).

[25] The Alaska, 130 U. S. 201, 209; 9 Sup. Ct. 461; 32 L. Ed. 923, aff'g 33 Fed. (U. S. C. C. S. D. N. Y. 1887) 107.

[26] The Albert Dumois, 177 U. S. 240, 259; The Corsair, 145 U. S. 335, 344; Butler v. Boston Steamship Co., 130 U. S. 527, 555; The Schooner Robert Lewers Co. v. Kekauoha, 114 Fed. 849, 851; Middleton v. La Compagnie Gen. Trans., 100 Fed. 866; Rundell v. La Compagnie Gen. Trans., 100 Fed. 659; 94 Fed. 367; The Glendale, 81 Fed. 633; Bigelow v. Nickerson, 70 Fed. 115; City of New Orleans v. Abbagnato, 62 Fed. 245; Asher v. Cabell, 50 Fed. 824. See sections next following herein.

[27] The Harrisburg, 119 U. S. 199.

[28] 130 U. S. 527, 555 (App. from U. S. C. C. D. Mass.).

decision is cited, and the court[29] adds, "The maritime law of this country at least gives no such right." In another case it is determined that a suit in admiralty does not lie to recover damages for death by negligence on the high seas, either under the general maritime law or under act of Congress.[30] Again, in 1883, it was held that courts cannot award damages for death upon the high seas until the law and treaty-making power has authorized and fixed the action.[31]

§ 939. Same subject continued—Negative rule extended.—Whatever may have been implied by way of an affirmative from the assertion of the negative rule in The Harrisburg,[32] has been extended so as to include a right to sue for damages where the statute or law of the forum permits an action to recover for the loss sustained by the negligent or wrongful killing of a human being, and such statutes have been decided to be applicable, even though the death by negligence occurred upon the high seas.[33] So an action lies in admiralty for injury to a seaman resulting from negligence of the owner of a steam tug and the boiler exploding, and under the state statute the action survives to the father of a minor, or if his father be dead, then to the mother.[34] And a suit for damages for death by collision on navigable waters is a tort within the ancient jurisdiction of the United States district court, whether the right to sue is given by state or Federal legislation.[35]

§ 940. Same subject continued—Negative rule extended—

[29] Per Bradley, J.

[30] Rumdell v. La Compagnie Gen. Trans. (U. S. C. C. A. Ill. 1900), 40 C. C. A. 625; 100 Fed. 655, aff'g 94 Fed. 366, followed in In re La Bourgogne (U. S. D. C. S. D. N. Y.), 117 Fed. 261.

[31] The E. B. Ward, 16 Fed. 255.

[32] 119 U. S. 199.

[33] Re Pacey (U. S. D. C. D. Wash.), 95 Fed. 693; The Jane Grey (U. S. D. C. D. Wash.), 95 Fed. 693; Bigelow v. Nickerson (U. S. C. C. A. 7th C. E. D. Wis.), 17 C. C. A. 1; 34 U. S. App. 261; 70 Fed. 113; 30 L. R. A. 336; The Williamette (U. S. C. C. A. 9th C.), 18 C. C. A. 366; 44 U. S. App. 26; 31 L. R. A. 715, modified 18 C. C. A. 373; 44 U. S. App. 96; 31 L. R. A. 720, collision; Holland v. Brown (Or.), 35 Fed. 43, a case of death by collision. The Highland Light, Chase (U. S. 1867), 150; Fed. Cas. No. 6477.

[34] Grimley v. Hawkins (U. S. D. C. S. D. Ala.), 46 Fed. 400; Ala. Code, 1886, sec. 2588.

[35] The City of Norwalk (U. S. D. C. 1893), 55 Fed. 98.

Federal decision—Hawaiian law.—In the following recent decision the rule has also been extended so as to permit the suit for damages where the statute would authorize the same. The importance of this case [36] is further apparent by reason of the discussion of the Hawaiian law. The opinion is as follows: [37] "It is insisted on the part of the appellant that no cause of action for damages will lie in a court of admiralty within the territory of Hawaii for the death of a human being. That by the common law no civil action lies for an injury which results in death is well settled, and is now not denied. And since the decision of the supreme court in the case of The Harrisburg,[38] in which the theretofore conflicting decisions are referred to, and the question considered and determined on principle, it does not remain open to question that such an action will not lie in the courts of the United States under the general maritime law. In many jurisdictions, however, the rule has been changed by statute; and where by statute a right of action is given, whether arising on the land or on the sea, it is uniformly held that courts of admiralty, as well as courts of law, will entertain and enforce it.[39] The death here complained of occurred within one of the territories of the United States—that of Hawaii—over which the court below confessedly had admiralty jurisdiction, including the suit of the appellee, if there was any right of action in her. That depends upon the law prevailing in that territory at the time of the death in question. . . . among the statute laws of the republic of Hawaii set forth in the compilation by Mr. Ballou, is the following: 'Section 1109, the common law of England, as ascertained by English and American decisions, is hereby declared to be the common law of the Hawaiian Islands in all cases, except as otherwise expressly provided by the Hawaiian constitution or laws, or fixed by Hawaiian judicial precedent, or established by Hawaiian national usage, provided, however,

[36] The Schooner Robert Lewers Co. v. Kekauoha (U. S. C. C. A. 9th C.), 114 Fed. 849.

[37] Id. 851, 852, 854, per Ross, Cir. J.

[38] 119 U. S. 199; 7 Sup. Ct. 140; 30 L. Ed. 358.

[39] (Citing), The Harrisburg, supra, and cases there cited; The Corsair, 145 U. S. 335; 12 Sup. Ct. 949; 36 L. Ed. 727; The Williamette, 18 C. C. A. 346; 70 Fed. 874; 31 L. R. A. 715; Laidlaw v. Navigation Co., 26 C. C. A. 665; 31 Fed. 876; Association v. Christopherson, 19 C. C. A. 481; 73 Fed. 239; 46 L. R. A. 264.

that no person shall be subject to criminal proceedings except as provided by the Hawaiian laws.'[40] Turning to the decisions of the supreme court of Hawaii, we find that the precise right asserted and sustained in the present case was there asserted and sustained as early as 1860—nearly forty years prior to the passage of the act of Congress of April 30, 1900. Kake v. Horton[41] . . . as will have been observed, the supreme court there expressly declared, 'The principle which we now recognize will become, by judicial adoption, a valuable part of the common law of this kingdom.' Such judicial modification of the common law the legislature of Hawaii expressly sanctioned and ratified by section 1109 of Ballou's compilation of the laws of that country, which, as has been seen, was, in turn, sanctioned and ratified by section 1 of the act of Congress of April 30, 1900, above set out. There was, therefore, statutory authority for the right asserted, and sustained by the court below. It is a mistake to say, as do the counsel for the appellant, that the case of Kake v. Horton was overruled by the later case of Bishop v. Lokana.[42] That was an action of trespass quare clausum fregit, brought by the owner of the land trespassed upon, who subsequently died, and whose executors thereafter appeared in court and filed a suggestion of her death, and prayed that the suit might proceed to final judgment. The court granted a motion to set aside the appearance of the executor, saying, 'Actions for injury to real estate do not survive to the executor or administrator, for the real estate passed to the heir or devisee and not to the personal representative.' At the end of the opinion the judge delivering it said, 'I notice in Kake v. Horton,[43] that this court doubted whether an administrator could maintain an action on the death of a person, but allowed the widow to maintain a suit.' So far from the case of Bishop v. Lokana overruling the doctrine announced in the case of Kake v. Horton, the clause last quoted from Bishop v. Lokana indicates, rather, an approval of that ruling." [44]

§ 941. Death—Relief must be given in conformity with

[40] Civ. Law, Hawaii, 1897, p. 447.
[41] 2 Hawaii, 209.
[42] 6 Hawaii, 556.
[43] 2 Hawaii, 213.
[44] The Schooner Robert Lewers Co. v. Kekauoha (U. S. C. C. A. 9th C.), 114 Fed. 849, 851, 852, 854, per Ross, Cir. J.

statute.—An action to recover for wrongful death is not authorized by the maritime law, but rests solely upon the statutory enactments of the territorial jurisdiction, and although a court of admiralty has jurisdiction of the cause of action, as such tort is of a maritime nature when committed upon navigable waters, it can give no relief except in conformity with the statute which creates that right.[45]

§ 942. Death—Waters within state—Action for damages.—It was decided in 1876, by the United States supreme court that until Congress makes some regulation touching the liabilities of parties for damages for maritime torts resulting in death of the injured persons, a state statute, giving a right of action to recover for the loss occasioned by death by wrongful, etc., act, applied where a maritime tort was committed within the territorial limits of the state, and as thus applied it constituted no encroachment upon the commercial power of Congress,[46] and admiralty has jurisdiction where the wrongful act causing death was committed upon waters navigable from the sea.[47] So also, where the death occurred in the Canadian waters of the Detroit river and the vessel is brought within the jurisdiction of the court by another libel,[48] or where the death occurred on waters of an inland lake more than three miles from shore,[49] or where the death occurs upon the ocean within the three-mile limit.[50] And the right of an action given by statute may also be enforced in the national courts in the case of a passenger upon a ferry-boat plying within the state upon a public navigable river, said

[45] Stern v. La Compagnie Gen. Trans. (U. S. D. C. S. D. N. Y.), 110 Fed. 996, 998; The A. W. Thompson (U. S. D. C. N. Y. 1889), 39 Fed. 115.

[46] Sherlock v. Alling, 93 U. S. 99, Ind. statutes.

[47] So held in The Glendale (U. S. D. C. E. D. Va.), 77 Fed. 906, but rev'd Evitch v. The Glendale (U. S. C. C. A. E. D. Va.), 42 U. S. App. 546; 81 Fed. 633.

[48] Robinson v. Detroit & C. S. N. Co. (U. S. C. C. A. 6th C. E. D. Mich.), 43 U. S. App. 191; 73 Fed. 883; Hurley v. City of Mackinaw, id.; Hurley v. Detroit & C. S. N. Co., id.

[49] Bigelow v. Nickerson (U. S. C. C. A. 7th C. E. D. Wis. Wis. Statute), 17 C. C. A. 1; 34 U. S. App. 261; 70 Fed. 113; 30 L. R. A. 336.

[50] In re Humboldt Lumber Mfrs. Assn. (Cal. 1894), 60 Fed. 428; 3-mile limit extended by Const. Cal. art. 21, sec. 1, and Pol. Code, sec. 33.

passenger being drowned by the negligence of the owner of the boat or its servants.[51]

§ 943. Death—Owners residing in state—Action for damages.—Admiralty may take jurisdiction of a suit for damages for loss of a human life caused by collision upon the high seas, where the vessel's home port is in the state, and the owners of said vessel reside in said state.[52]

§ 944. Death—Libel in personam—Waters within state—Action for damages.—Libel in personam may be maintained when the death is caused by a negligent collision upon waters navigable within the state, and damages are given for death by negligent, etc., act, under statutes similar to Lord Campbell's Act, in force in the state, where the cause of action and right to recover damages accrued.[53]

§ 945. Death—Libel in rem—Action for damages.—If the statute gives a right to sue for damages suffered by death occasioned by wrongful, etc., act, and a person is killed in a collision upon navigable waters, a libel in rem lies.[54] And such libel is proper to recover damages for an officer's negligence causing a passenger's death.[55] And so where the mate is killed in a collision,[56] or where a ship hand is killed by the collapse of a steam chimney, due to the negligence of a coemployee, especially where the state makes the shipowner liable for negligence for injuries from boilers bursting and the like.[57] It was decided, however,

[51] Holmes v. Oregon & C. R. Co. (U. S. D. C. D. Or. 1880), 5 Fed. 75; 6 Sawy. 262. See Holland v. Brown (U. S. D. C. D. Or.), 35 Fed. 43; The St. Nicholas (U. S. D. C. D. Ga.), 49 Fed. 671.

[52] The E. B. Ward, 17 Fed. 456, rev'g (U. S. C. C. La. 1883), 16 Fed. 255.

[53] Robinson v. Detroit & C. Steam Nav. Co. (U. S. C. C. A. 6th C. E. D. Mich.), 20 C. C. A. 86; 43 U. S. App. 191; 73 Fed. 883; The Car Float No. 16 (U. S. C. C. A. S. D. N. Y. 1894), 9 C. C. A. 521; 20 U. S. App. 570; 61 Fed. 364, aff'g The City of Norwalk, 55 Fed. 98.

[54] The Garland (U. S. 1881), 5 Fed. 924.

[55] The Chas. Morgan, 2 Flip (U. S. 1878), 274; Fed. Cas. No. 2618.

[56] The Tonawanda (1877), 13 Phila. 464.

[57] The Highland Light, Chase (U. S. 1867), 150; Fed. Cas. No. 6477, under Md. Stat. 1 Code, 449, and Act, July 7, 1838, sec. 13. See also The Steamship Oregon (U. S. D. C.

in 1889, that a libel in rem could not be maintained in the absence of a state or Federal statute, giving a right to recover damages for wrongful, etc., death,[58] while in 1884 it was determined that even though a state statute gave such right of action for a death loss, it did not relate to a maritime right, and a libel in rem did not lie.[59]

§ 946. Death—Survival of action—Libel in rem—Statutory lien—Damages.—It was decided in 1883 that an action for loss of life caused by a maritime tort survived in admiralty.[60] But in 1888, it was held that the action given by a state statute did not survive in admiralty, and that a libel in rem did not lie.[61] And in 1891, the supreme court of the United

D. Or.), 42 Fed. 78. In 1879 it was held that a libel in rem lies independent of the statutory remedy. The David Reeves, 5 Hughes (U. S.), 89; Fed. Cas. No. 6625; The E. B. Ward, Jr.: Carlsdotter v. The E. B. Ward, Jr. (U. S. C. C. E. L. La. 1883), 17 Fed. 456, rev'g 16 Fed. 255, was an action for damages for the loss of human life, and it was said that under art. 2315, Civ. Code, La., an action lies in the state courts for death damages, and if the collision had occurred on navigable waters within the state, this would be true, and in the latter case the admiralty court could give a remedy against the ship. "'A vessel at sea is considered a part of the territory to which it belongs and so carries with it the local rights and legal jurisdiction of such locality. All on board are endowed and subject accordingly. . . The jurisdiction of the local sovereign over those belonging to her in the home port and aboard on the sea, is according to the law of nations the same.' Wilson v. McNamee, 102 U. S. 572. . . See also Crapo v. Kelly, 16 Wall. (U. S.) 610. Why then, if the E. B. Ward, Jr., when on the Gulf of Mexico, was a part of the territory of Louisiana, so far as legal rights and legal jurisdiction was concerned, should not the state courts of Louisiana entertain an action at law for damages against the owners for the wrongful conduct of their agents in bringing on the collision which resulted in the death of libellant's husband, father and son, and if the state courts give such action, why should not this court hold (following the conceded practice) 'that the cause of action, therefore, existed by force of the territorial statute, and since it constituted a tort and was upon navigable waters and occurred in a case of collision, the court of admiralty could enforce it in a proceeding in rem." Id.' 459, per Pardee, J.

[58] The Wydale (U. S. C. C. E. D. La.), 37 Fed. 716.

[59] The Manhasset (U. S. D. C. Va.), 18 Fed. 918. Examine The Alaska (1888), 130 U. S. 201; 32 L. Ed. 923; 9 Sup. Ct. 461, aff'g 33 Fed. 107.

[60] The E. B. Ward, Jr.: Carlsdotter v. The E. B. Ward, Jr. (U. S. C. C. E. D. La.), 17 Fed. 456, rev'g 16 Fed. 255. See The Sea Gull, Chase's Dec. (U. S.) 145.

[61] Oleson v. The Ida Campbell, 34

States determined that a district court in admiralty could not entertain a libel in rem for damages suffered by death of a human being, where the state statute created no express lien, and that even though a right of action survived to recover damages for death losses under the statute, it was local as to the survival.[62]

Fed. 432; Gen. Stat. Minn. p. 825, sec. 2.

[62] The Corsair: Barton v. Brown (App. from U. S. C. C. E. D. La.), 145 U. S. 335; 36 L. Ed. 727; 12 Sup. Ct. 949; 46 Alb. L. J. 66. Mr. Justice Brown gave the following opinion: "An important question arises in connection with the dismissal of the original libel, which has never been squarely presented to this court before, and that is as to the power of the district court to entertain a libel in rem for damages incurred by loss of life, where by the local law a right of action survives to the administrator or relatives of the deceased, but no lien is expressly created by the act. A similar question arose in case of Ex parte Gordon, 104 U. S. 515, where a writ of prohibition was applied for to enjoin the prosecution of an action in rem for the loss of life; but the writ was denied upon the ground that the liability was within the jurisdiction of the district court to decide, and any error it might commit in this particular could only be corrected by appeal. Subsequently, in the case of The Harrisburg, 119 U. S. 199, it was held that in the absence of an act of Congress, or a state statute giving a right of action therefor, a suit in admiralty could not be maintained to recover damages for the death of a human being caused by negligence. This was a mere application to the court of admiralty of a principle which had been announced by this court as applicable to courts of common law in Insurance Co. v. Brame, 95 U. S. 754. The Harrisburg was a Pennsylvania vessel, and the collision occurred in the waters of Massachusetts, both of which states gave a remedy by civil action, with a proviso that such action should be brought within one year after the death; and while the question of the right to sue in rem for the recovery of such damages, when an action at law had been given therefor by the state statute, was presented in that case, it was not decided, since the suit was not begun until nearly five years after the death, and the case went off upon that ground. Prior to this decision, a number of libels, both in rem and in personam, had been brought for the loss of life in the courts of different districts, and as a rule the liability was held to exist, but the question whether such liability should be enforced in rem or in personam does not seem to have been discussed, except in the cases of The Sylvan Glen, 9 Fed. 335, and The Manhasset, 18 Fed. 918, in one of which Judge Benedict and in the other Judge Hughes held that while the state statute created a right, it did not create a lien, and that a libel in rem could not be maintained. Since the decision in The Harrisburg case that no libel can lie except where a right to sue is given by a local statute, the question has been presented only in the case of the North Cambria, 40 Fed. 655, in which Judge Butler adopted the

§ 947. Instantaneous death—Pain and suffering—Survival of action—Libel in rem—Damages.—The following opinion evidently excludes pain and suffering of a drowning person as a basis of damages. The court says: "We do not find it necessary to express an opinion whether a libel in rem will lie for injuries suffered by the deceased before her death, a right of action for which passes to her immediate relatives under the Louisiana statute, since there is no proper averment in the libel to show that such damages were suffered.[63] . . . There is no averment from which we can gather that these pains and suffering were not substantially contemporaneous with her death and inseparable as matter of law from it.[64] Had she suffered bodily wounds and bruises from the effect of which she lingered and ultimately died, it is possible that her sufferings during her illness would give a separate cause of action, but the very fact that she died by drowning indicates that her sufferings must have been brief and in law a mere incident to her death. Her fright for a few

views expressed in The Sylvan Glen and The Manhasset. In The Oregon, 45 Fed. 62, a lien was given by the state statute, and was enforced in admiralty." The court then considers the English decisions and continues: "As we are to look, then, to the local law in this instance for the right to take cognizance of this class of cases, we are bound to inquire whether the local law gives a lien upon the offending thing. If it merely gives a right of action in personam for a cause of action of a maritime nature, the district court may administer the law by proceedings in personam . . . but unless a lien be given by the local law, there is no lien to enforce proceedings in rem in the court of admiralty. The Louisiana act declares in substance that the right of action for every act of negligence which causes damage to another shall survive in case of death in favor of the minor children or widow of the deceased; and in default of these, in favor of the surviving father and mother, and that such survivors may also recover the damages sustained by them by the death of the parent, child, husband or wife. Evidently nothing more is here contemplated than an ordinary action, according to the course of law as it is administered in Louisiana. There is no intimation of a lien or privilege upon the offending thing, which, as we have already held, is necessary to give a court of admiralty jurisdiction to proceed in rem."

[63] It is true that the 7th par. alleges that from the time the "tug struck the bank of the river to the time she sunk" (about ten minutes) "and the said Ella Barton was drowned, the said Ella Barton suffered great mental and physical pain and shock and endured the tortures and agonies of death."

[64] Citing several Massachusetts cases.

minutes is too unsubstantial a basis for a separate estimation of damages.[65]

§ 948. Death—Libel in rem—Statutory lien—Action for damages—Waters within state.—If a lien upon the vessel is created by the state statute enforceable by a libel in rem, where the negligent, etc., act causing an injury which resulted in death occurs upon waters within the state, navigable from the sea, such lien may be enforced.[66] Again, although the state statute giving a right of action for damages for wrongful, etc., death is not accompanied by any privilege of lien on the offending thing, if any, and although it may arise out of a maritime tort, it can only be asserted in admiralty in personam. But if there is also a statutory lien or privilege given against vessels navigating waters within the state, making them liable and subject to said lien for all damages or injuries to person, etc., a lien may be given in an action for death losses.[67] And it has also been decided that the action for damages for death by negligence may be enforced, even though the statute gives no lien, by a proceeding in personam.[68] But it has been declared that where there is no statute of the United States or of the state within whose territorial limit the collision occurred, which gives a lien upon a vessel for damages on account of the death of a human being through negligence, an intervening libel, which is a libel in rem, cannot be maintained.[69]

[65] The Corsair (App. from U. S. C. C. E. D. La.), 145 U. S. 335, 348, per Brown, J.

[66] The Glendale: Evich v. The Glendale (U. S. D. C. 1896), 77 Fed. 906, aff'd The Glendale v. Evich: The Glendale (U. S. C. C. E. D. Va.), 42 U. S. App. 546; 81 Fed. 633.

[67] The Oregon (U. S. D. C. Or. 1891), 45 Fed. 62. The case was rev'd (1895), 158 U. S. 186; 39 L. Ed. 943; 15 Sup. Ct. 804. As to intervention, see *S. C.*, 42 Fed. 78. See also The Oregon (U. S. D. C.), 73 Fed. 846, dis'g The Corsair, 145 U. S. 335; 36 L. Ed. 727; 12 Sup. Ct. 949. Examine Laidlaw v. Oregon R. & Nav. Co. (1897), 26 C. C. A. 665; 81 Fed. 876; The Premier (U. S. D. C. D. Wash.), 59 Fed. 797; The Williamette (1895), 18 C. C. A. 366; 70 Fed. 874; 31 L. R. A. 715; 18 C. C. A. 373; 72 Fed. 79.

[68] The City of Norwalk (U. S. D. C. N. Y. 1893), 55 Fed. 98, modified 9 C. C. A. 521; 61 Fed. 364. See also The St. Nicholas (U. S. D. C. D. Ga.), 49 Fed. 671; City of Milwaukee v. The Curtis (U. S. D. C. Wis. 1889), 37 Fed. 705; 3 L. R. A. 711, holding that a libel in rem lies even though the statute gives no lien where the vessel collided with a stone hedge resting on a pier on the river bed.

[69] The Wydale: Andrews v. The

§ 949. Death—Absence of statute giving lien—Deduction of moiety of damages.—The fact that the statute of the state gives no lien cannot affect the question of a deduction of a moiety of the damages awarded.[70]

§ 950. Death without the state.—The statute of Louisiana does not apply to death on the high seas without said state, the deceased being of a foreign country and domiciled therein.[71]

§ 951. Death—Foreign law and foreign vessel.—Where the cause of action for death arose upon a foreign vessel on the high seas, without the jurisdiction of any country, admiralty

Wydale; Walker v. The Same (U. S. C. C. E. D. La.), 37 Fed. 716, 720, per Pardee, J. See The Oregon (1895), 158 U. S. 186; 39 L. Ed. 943; 15 Sup. Ct. 804, as to intervening libel. In Welsh v. The North Cambria (D. C. E. D. Pa.), 40 Fed. 655; *S. C.*, 39 Fed. 615, it was held that the acts of assembly of Pennsylvania, approved April 15, 1855, P. L. 674, and April 26, 1855, P. L. 309, do not by their terms create a lien for death by negligence upon the high seas, and as there is no jurisdiction outside of statutory provision, none can be sustained, citing The Harrisburg, 119 U. S. 199; 7 Sup. Ct. 140, on point that libel cannot be sustained, independently of statutory provision; It is also decided in this connection that the admiralty system of laws is within the exclusive control of Congress and the states have no power to legislate in regard to it, and although in some few instances the states may exercise powers vested in the Federal government, yet this doctrine is not to be extended beyond the subjects to which it has been applied. The court, per Butler, J., considers The Lottawana, 21 Wall. (U. S.) 580; The E. A. Barnard, 2 Fed. 712, and adds that the decisions of the district courts are not harmonious. "In the Sylvan Glen, 9 Fed. 33, and the Manhasset, 18 Fed. 918, the state statutes were denied effect in the admiralty. This view is also supported by the judgment in The Vera Cruz, L. R. 10 App. Cas. 198. In other instances the question has been decided differently."

[70] The Albert Dumois (cert. from C. C. A. 5th C.), 177 U. S. 240, 259 et seq.; 59 U. S. App. 108. The La. Civ. Code, art. 2315, does not give a lien or privilege upon the vessel and nothing more is contemplated by it than an ordinary action according to the course of the law as administered in Louisiana. Id. 258, per Mr. Justice Brown, citing The Corsair, 145 U. S. 335 (App. from C. C. U. S. E. D. La.). It was also declared that art. 3237, Code, subd. 12, did not give a remedy for damages occasioned by death to the representatives of the deceased, or at least if it did, "it would never have escaped the attention of the astute counsel who participated in" the case of The Corsair. Id.

[71] The E. B. Ward Jr. (U. S. C. C. La.), 10 Fed. 255.

will not take cognizance of an action for damages therefor, even though the laws of the country of such vessel create a liability.[72]

§ 952. Death—State courts—Maritime liens.—State courts have jurisdiction over an injury consequential upon marine torts, where no remedy therefor exists in admiralty. The state courts may also grant a remedy for injury causing death through the negligence of a steamer, even though the state statute giving a right to recover damages in such case was passed after the judiciary act, although questions of this kind cannot arise in suits to enforce maritime liens, as the common law is not competent to give such remedy, the jurisdiction of admiralty being exclusive.[73] But it is also decided that the death of an employee of a steamboat, caused by a fellow servant's negligence, is not within the state statute as to give a recovery for wrongful death.[74]

§ 953. Death—Negligence and contributory negligence—Defenses—Division of damages.—In cases of collision, contributory negligence is not in admiralty a bar to relief, but only a reason for dividing the damages, and this seems to be the tendency also in cases of torts.[75] And where the managing owner of a tug was killed through collision, and the master of the tug was guilty of contributory negligence, no recovery can be had. But the representatives of a passenger killed by collision may recover damages for his death, notwithstanding the negligence of the owners of the tug or that of their servants, both vessels being at fault.[76] And the owners of both vessels causing the death

[72] Rundell v. La Compagnie Gen. Trans. (U. S. D. C. N. D. Ill. 1899), 94 Fed. 366.

[73] American Steamboat Co. v. Chase, 16 Wall. (U. S.) 522; 21 L. Ed. 369; 9 R. I. 419. That action lies against vessel, see Bouiller v. Milwaukee, 8 Minn. 97. See The E. B. Ward, Jr.; Carlsdotter v. The E. B. Ward, Jr. (U. S. C. C. E. D. La.), 17 Fed. 456, rev'g 16 Fed. 255, and opinion, sec. 946 note, herein; McDonald v. Mallory, 77 N. Y. 546; 7 Abb. N. C. (N. Y.) 84, rev'g 44. Super. 80.

[74] Miller v. Coffin, 19 R. I. 164; Pub. Stat. ch. 204, sec. 15.

[75] Ladd v. Foster (U. S. D. C. D. Or.), 31 Fed. 827, 831, per Deady, J., a case of a suit for damages against a steam ferryboat on which deceased was a passenger.

[76] Hurley v. City of Mackinaw;

of a passenger are liable in solido for the resulting damages for such killing, when both are negligent.[77]

§ 954. Death—Liability for one half the damages—Offset where losses are even.—In cases of collision where both vessels are at fault, each is liable for one half the damages suffered by the other. Where the losses are even, the one offsets the other, but where they are uneven, the half of the difference between the losses is the sum which the one sustaining the lesser loss must pay to the one sustaining the greater.[78] And in such case of mutual fault of vessels, whereby members of the crew are killed, the recovery for their death is limited to half the award to those entitled to damages.[79] And one half the amount recovered as damages for loss by death, negligently occasioned, should, where both vessels are so at fault, be deducted from the award, in a libel against the owner.[80]

§ 955. Personal injury—Death—Limited Liability Act.—The Limited Liability Act,[81] sec. 4283, provides as follows: "The liability of the owner of any vessel, for any embezzlement, loss or destruction, by any person, of any property, goods or merchandise shipped or put on board such vessel, or for any loss, damage, or injury by collision, or for any act, matter, or thing, lost, damage, or forfeiture, done, occasioned or incurred, without the privity or knowledge of such owner or owners, shall in no case exceed the amount or value of the interest of such owner in such vessel and her freight then pending." This enactment applies

Same v. Detroit & C. S. Nav. Co. (U. S. C. C. A. 6th C. E. D. Mich.), 43 U. S. App. 191; 73 Fed. 883. Robinson v. Detroit & C. S. Nav. Co., id.

[77] Holland v. Brown (U. S. D. C. D. Or.), 35 Fed. 43. See further MacMahon v. Brooklyn & N. Y. F. Co., 10 App. Div. (N. Y.) 376; 41 N. Y. Supp. 1026. When negligence of mate of pilot boat justifiable, see Carlson v. United N. Y. S. H. P. Assn. (U. S. D. C. D. N. Y.) 93 Fed. 468. When master not liable, Cheatham v. Red River Line (U. S. C. C. E. D. La.), 56 Fed. 248.

[78] The Oregon (U. S. D. C. D. Or.), 45 Fed. 62, a case of death where a member of the crew was killed, citing The Sapphire, 18 Wall. (U. S.) 56; The North Star, 106 U. S. 18; 1 Sup. Ct. 41. See chap. XL, herein.

[79] The Job T. Wilson (U. S. D. C. D. Md.), 84 Fed. 204.

[80] The Albert Dumois (cert. from U. S. C. C. A. 5th C.), 117 U. S. 240, 257; La. Civ. Code, art. 231.

[81] U. S. Rev. Stat. secs. 4283–4285.

to damages for personal injury and loss of life as well as to cases of injury to goods and merchandise, and those entitled to damages are deprived of the right to entertain suit for recovery, provided the shipowner has taken appropriate proceedings to limit his liability, such proceedings being a good defense to the libel.[82] The negligence may be such, however, in failing to discover the

[82] Butler v. Boston & S. S. Co., 130 U. S. 527; 9 Sup. Ct. 246; 37 L. Ed. 60 (App. from U. S. C. C. E. D. La), as interpreted by Mr. Justice Brown in The Albert Dumois (cert. to U. S. C. C. A. 5th C.), 177 U. S. 240, 259, where the court says of the Butler case that it was therein "unanimously held, that the Limited Liability Act applied to cases of personal injury and death, as well as to those of loss of or injury to property. This was an independent libel in personam against the steamship company to recover damages for death, and the company pleaded in defense certain proceedings in a case of limited liability, instituted by it and then pending. There was a statute of Massachusetts relied upon which gave a personal remedy, but no lien upon the vessel. The loss occurred within the jurisdiction of that state. The single question presented was whether the Limited Liability Act applied to damages for personal injury and loss of life, and thus deprived those entitled to damages of the right to entertain suit for recovery, provided the shipowner had taken appropriate proceedings to limit his liability. The court, after a careful examination of the law of limited liability of shipowners, had no difficulty in reaching the conclusion that it covered the case of injuries to persons as well as that of injury to goods and merchandise, and that these proceedings were a good defense to the libel." See also Craig v. Continental Ins. Co., 141 U. S. 638. The Amsterdam, 23 Fed. 112; The City of Columbus, 22 Fed. 46; Briggs v. Day, 21 Fed. 727; The Olpena, 10 Biss. (U. S.) 436; 8 Fed. 28; The Epsilon, 6 Ben. (U. S.) 378; In re Petition of Long Island N. S. P. & F. T. Co., 5 Fed. 599; Rounds v. Steamship Co., 14 R. I. 344. That the liability of owners for death upon the high seas may be enforced under the state statute, see In re Humboldt Lumber Mfg. Assn. (1894), 60 Fed. 428. That limitation of liability act may be set up as defense in a common-law action in a state court for death caused in a collision, see Loughin v. McCaulley, 186 Pa. 517; 42 W. N. C. 519; 40 Atl. 1020; 48 L. R. A. 33. That 3d sec. of Harter Act does not apply to injuries to passengers, see The Rosedale (U. S. D. C. S. D. N. Y.), 88 Fed. 324. See as to sec. 4283, Rev. Stat. sec. 4493, Rev. Stat., and act of Congress, June 26, 1884, and death of passengers, The Annie Faxon (U. S. D. C. D. Wash.), 66 Fed. 575. As to parties on appeal where there are separate claims for damages for death for different persons in proceedings of owners to limit their liability, see The Columbia (U. S. C. C. A. 9th C. D. Or.), 44 U. S. App. 326; 19 C. C. A. 436; 73 Fed. 226; Short v. The Columbia, id. As to exemption of liability for damages to passengers under statute providing for better security of lives of passengers, etc., on vessels, see Sherlock v. Alling, 3 Otto (93 U. S.), 99; 23 L. Ed. 819.

defect, which occasioned a passenger's death, that the statute limiting liability cannot be availed of.[83] Again, this act also applies, even though the disaster happened within the technical limits of a county within a state, and notwithstanding the liability itself may have arisen from a state law.[84]

[83] Re Meyers Excursion & Nav. Co. (U. S. D. C. E. D. N. Y.), 57 Fed. 240.

[84] Butler v. Boston & S. S. Co., 130 U. S. 527, 558; 9 Sup. Ct. 246; 37 L. Ed. 60, per Bradley, J. Sec. 4, Act, June 19, 1886, extended the law of limited liability to navigable rivers above tide waters, and it applies to enrolled and licensed vessels exclusively engaged in commerce on such a river. Garnett, In re, 141 U. S. 1; The Katie, 40 Fed. 48.

CHAPTER XL.

MARINE TORTS AND CONTRACTS—PROPERTY.

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958. Same subject continued.
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§ 956. Collision—Damages—General rules.—In case of collision between vessels, if the fault is wholly on one side, the party in fault must bear his own loss and compensate the other party, if the latter has sustained any damage. If neither be in fault, neither is entitled to compensation from the other. If both are in fault, the damages will be divided.[1] But fault on the part of a sailing vessel, at the moment preceding collision, does not operate to absolve a steamer which has suffered herself to come into close proximity to the sailing vessel, causing inevitable alarm and confusion. The steamer thus commits a far greater fault and is chargeable with all the damages resulting from the collision.[2] Nor will the fact that the sinking and total loss of a schooner could have been prevented by reasonable efforts on the part of her officers and crew, preclude the recovery of such vessel's full value, where the tug, the negligence of which occasioned the collision, was a powerful one and made no effort to save the vessel, and this irrespective of the fact that

[1] Union Steamship Co. v. New York & Va. S. S. Co., 24 How. (U. S.) 307. See the Clara, 102 U. S. 200, 208; The Juniata, 93 U. S. 337; The Atlas, 93 U. S. 302, 319; The Sunnyside, 91 U. S. 208, 215; The Clarita and The Clara, 23 Wall. (U. S.) 1, 13; The Continental, 14 Wall. (U. S.) 345, 355; The Maria Martin, 12 Wall. (U. S.) 31, 43; The Morning Light, 2 Wall. (U. S.) 550, 556; Foley v. McKeever, 67 N. Y. Supp. 559; 56 App. Div. (N. Y.) 517; Desty's Ship. & Adm. (ed. 1879) sec. 403. See the next following section herein.

[2] The Carroll, 8 Wall. (U. S.) 302.

she might not have been able to rescue her.[3] So the owners of a steamer are liable for the damages caused by a collision wherein she was alone to blame, and whereby a barque was grounded and abandoned as a natural and reasonable consequence of such collision.[4] And if it clearly appears that a fault committed by a vessel had nothing to do with a disaster which has occurred, the recovery will be against the vessel alone which has produced the disaster.[5] If, however, the collision is the result of inevitable accident, without the negligence or fault of either party, each vessel must bear its own loss.[6]

§ 957. Same subject continued—Division and apportionment of damages.—It is well settled that where both vessels are equally in fault for a collision, the entire damages occasioned thereby will be equally divided in admiralty, such being the maritime rule.[7] And half the difference between their respective

[3] The Gladiator (U. S. C. C. A. 1st C.), 50 U. S. App. 11; 79 Fed. 445. See Boston Towboat Co. v. Pettie (U. S. C. C. A. 2d C.), 1 U. S. App. 57; 49 Fed. 564.

[4] The City of Lincoln (C. A.), L. R. 15 P. D. 15.

[5] The Pennsylvania, 19 Wall. (U. S.) 125. See Sturgis v. Boyer, 24 How. (U. S.) 110. Examine The Morgengry, 69 L. J. Prob. 3; 48 Week. Rep. 121; 81 Law T. (N. S.) 417, noted second section next following herein. See also as to apportionment without regard to inequality of fault or of value. The Maling; The S. A. McCaulley (U. S. D. C. D. Del.), 110 Fed. 227; 10 Am. Neg. Rep. 357, 372, per Bradford, Dist. J.

[6] Stainback v. Rae, 14 How. (U. S.) 532. See The Morning Light, 2 Wall. (U. S.) 550, 560. As to inevitable accident, see Desty's Ship. & Adm. (ed. 1879) secs. 384, 385.

[7] The "North Star," 106 U. S. 17; collision at sea in the night between two steamers pursuing nearly opposite courses. The Chattahoochee, 173 U. S. 540; 43 L. Ed. 801; 19 Sup. Ct. Rep. 491; topsail schooner and steamer collided in a dense fog. The Potomac, 105 U. S. 630; collision between two vessels. The Connecticut, 103 U. S. 710; boat towed by one vessel was sunk. The Stephen Morgan, 94 U. S. 599; The America, 92 U. S. 432; two vessels under steam met end on, or nearly on. The Sunnyside, 91 U. S. 208; collision was on Lake Huron about 3 miles from shore between a sailing vessel and a steam tug. The Pennsylvania, 19 Wall. (U. S.) 125; collision in a dense fog between a sailing bark and a large steamer about 200 miles from Sandy Hook. The Continental, 14 Wall. (U. S.) 345; collision between two vessels at night. The Maria Martin, 12 Wall. (U. S.) 31; two vessels were approaching each other from opposite directions. The Sapphire, 11 Wall. (U. S.) 505; vessel at anchor in a gale and another vessel collided. The Gray Eagle, 9 Wall. (U. S.) 505; failure to show signal

losses will be decreed in favor of the vessel that suffered most, so as to equalize the burden.[8] But the decree should not be in solido for the full amount of damages sustained by the libellant, but several against each, for one half of his damage and costs, any balance which he shall be unable to enforce against either vessel, to be paid by the other, or its stipulators, to the extent of her stipulated value beyond the moiety due from her.[9] And

lights and to observe the laws of navigation. The Morning Light, 2 Wall. (U. S.) 550; two vessels collided on a dark night, one being astern. Union Steamship Co. v. New York & Va. S. Co., 24 How. (U. S.) 307; collision on river between two steamships; Chamberlain v. Ward, 21 How. (U. S.) 558; collision upon Lake Erie between propeller and steamer. The Brig James Gray v. The Ship John Frazer, 21 How. (U. S.) 184; vessel being towed in port by a steam tug collided with a vessel at anchor. The Catharine v. Dickinson, 17 How. (U. S.) 170; two sailing vessels. The Mariska (U. S. C. C. A. Ill.), 47 C. C. A. 115; 107 Fed. 989, rev'g 100 Fed. 500; The Hercules (U. S. D. C. E. D. Va.), 70 Fed. 330; one of the vessels was sunk. The C. R. Stone (U. S. D. C. D. N. Y.), 68 Fed. 934; damages recovered from tug from scow going adrift from insufficient anchorage. The Kenilworth (U. S. D. C. S. D. N. Y.), 64 Fed. 890; collision in a fog. The Walleda (U. S. D. C. S. D. N. Y.), 64 Fed. 807; collision between two schooners. The Young America (U. S. D. S. D. N. Y.), 54 Fed. 410; damage to a canal boat by reason of a defect in a tug. The Moonlight (U. S. D. C. S. D. N. Y.), 50 Fed. 478; tug and her tow alongside attempted to land outside of another vessel. The Bolivia (U. S. C. C. A. 2d C.), 1 C. C. A. 221; 1 U. S. App. 26; 49 Fed. 169; steamship violated rule as to moderate speed in a fog and collided with another vessel. The George E. Starr (U. S. D. C. D. Wash.), 47 Fed. 749; The Non Pareille (U. S. D. C. S. D. N. Y.), 33 Fed. 524; both vessels persisted in their courses. The American (U. S. D. C. S. D. N. Y.), 32 Fed. 845; The Heather Belle, 3 Can. Excle. 40. The loss will be divided in three cases; first, when there is no fault on either side. Second, when the fault is inscrutable, and third, when both vessels are in fault. Desty's Ship. & Adm. (ed. 1879) sec. 403, citing The Fanny Fern and The Swan, Newb. 168; The Scioto, 2 Ware (Dav.), 350; 11 Law Rep. 16; 5 N. Y. Leg. Obs. 442; O'Neil v. Sears, 14 Law Rep. N. S. 731; The Marcia Tribon, 2 Sprague, 17.

[8] The "North Star," 106 U. S. 17. See London S. O. Ins. Co. v. Grampion S. Co. (C. A.), L. R. 24 Q. B. D. 663.

[9] "Sterling" and The "Equator," 106 U. S. 647; 27 L. Ed. 98. See The Max Morris, 137 U. S. 1, 9, where there was a question whether in case of an injury to a person by a marine tort, he being partly negligent, the decree should be for exactly one half the damages sustained, or might in the discretion of the court be for a greater or less proportion of the damages—*quære*. The Alabama and The Gamecock, 92 U. S. 695; 23 L. Ed. 673, where it was held that in case of a collision and damage done to an

while an innocent party is entitled to one half his damages from each wrongdoer, yet, if unable to obtain such half against either, the other can be compelled to pay the whole.[10] But if only one vessel is libeled, the recovery should be against such vessel for the whole amount of the damages and not for a moiety thereof.[11] Again, the rule that where both vessels are in fault, the sums representing the damage sustained by each must be added together and the aggregate divided between the two, is of course applicable, only where it appears that both vessels have been injured.[12]

§ 958. Same subject continued.—If a vessel free from fault be injured through the concurring and co-operating faults of two other vessels, all the damages resulting from the collision may be recovered from either or both of the latter. If only one be proceeded against, and the other is not made a co-defendant, the libeled vessel is liable in solido. If both offending vessels be proceeded against, the damages should be apportioned equally between them, the right being reserved to libellant to collect the entire amount from either of them to the extent of her stipulated value in case of the inability of the other to respond. If all three vessels have been guilty of fault, the total damages and costs must be equally divided between them.[13] And it is decided that, where a steamer and schooner

innocent party, the decree should be rendered, not against both vessels in solido for the entire damages, interest and costs, but against each for a moiety thereof, so far as the stipulated value of each extends, and it should provide that any balance of such moiety, over and above such stipulated value of either vessel, or which the libellant shall be unable to collect or enforce, shall be paid by the other vessel or her stipulators, to the extent of her stipulated value, beyond the moiety due from her. See Vessel Owners Co. v. Wilson (U. S. C. C. A. 7th C.), 11 C. C. A. 366; 63 Fed. 626.

[10] The Job T. Wilson (U. S. D. C. D. Md.), 84 Fed. 204. See The City of Hartford and The Unit, 97 U. S. 323; 24 L. Ed. 930; The Virginia Ehrman, 97 U. S. 309; 24 L. Ed. 890; The Washington and The Gregory, 9 Wall. (U. S.) 513; 19 L. Ed. 787; The Maling; The S. A. McCaulley (U. S. D. C. D. Del.), 110 Fed. 227; 10 Am. Neg. Rep. 357.

[11] The "Juniata," 93 U. S. 237; 23 L. Ed. 930.

[12] The Sapphire, 18 Wall. (U. S.) 51.

[13] The Maling; The S. A. McCaulley (U. S. D. C. D. Del.), 110 Fed. 227; 10 Am. Neg. Rep. 357, 371, 372, per Bradford, Dist. J., citing The Sterling and The Equator, 106 U. S. 647; 1 Sup. Ct. R. 89; The Civilta and The Restless, 103 U. S. 699; The

collided, one half the value of the cargo of the schooner should be deducted from half the value of the sunken schooner, and that the recovery was limited to the difference between these values.[14] The rule of equal apportionment of the loss between vessels mutually in fault applies, even though one contributed in a greater degree to the accident than did the other;[15] the sums representing the damages being added together and the amount being equally divided between the parties in all cases of mutual fault, even though one of the vessels may have been much more in fault than the other, for the inquiry which was the most to blame is immaterial, where fault is imputed to both vessels and the charge is proved.[16] So damages cannot be apportioned with relation to the different degrees of negligence of vessels colliding, in case of excessive speed of each vessel to its capacity, even though not to its extreme limit.[17] Again, the principles of justice and equity govern the apportionment of damages in equity courts,[18] and if there be a joint admiralty suit, a decree need not be passed against the respondents jointly, since, if equity requires it, the damages may be apportioned among them.[19] So, in applying the rule of an equal division of damages, they will be divided as the circumstances surrounding the tort may require.[20] Again, where the injury is to persons and property on board and the injured vessel is equally in fault, before anything is allowed as damages to the other vessel, the claims against her will be paid out of the pro-

City of Hartford and The Unit, 97 U. S. 323, 329; The Juniata, 93 U. S. 337, 340; The Alabama and The Gamecock, 92 U. S. 695, 697; The Washington and The Gregory, 9 Wall. (U. S.) 513, 516; The Brothers, 2 Biss. 104; Fed. Cas. No. 1969; The Peshtigo (U. S. D. C.), 25 Fed. 488. See The Mariska (U. S. C. C. A. Ill.), 47 C. C. A. 115; 107 Fed. 989, rev'g 100 Fed. 500.

[14] The Chattahoochee, 173 U. S. 540.

[15] Ward v. The Yosemite, 4 Can. Exch. 241. See Cumberland Co. v. Central Wharf S. S. Co., 90 Me. 95; 37 Atl. 867.

[16] The Atlas, 93 U. S. 302, 315; The Maling; The S. A. McCaulley (U. S. D. C. D. Del.), 110 Fed. 227; 10 Am. Neg. Rep. 357, citing The Atlas, *ante*.

[17] The Chattahoochee (U. S. C. C. A. 1st C.), 21 C. C. A. 162; 33 U. S. App. 510; 74 Fed. 899.

[18] Sullivan v. Lake Superior El. Co. (U. S. D. C. D. Minn.), 56 Fed. 735.

[19] Penhallow v. Doane, 3 Dall. (U. S.) 54.

[20] The Edenmore (U. S. C. C. A. 5th C.), 30 C. C. A. 675; 58 U. S. App. 104; 86 Fed. 886.

ceeds of her sale.[21] And a decree in favor of the owners of a sunken schooner and the owners of her cargo, who had severally libeled a steamer and the tug which had towed the schooner, both being found in fault, was given each libellant for a moiety of his damages, interest and costs.[22] In another decision the owners of a steamer recovered judgment against the owners of a bark in tow for the entire damage, and also in the same action a judgment against the owners of the tug for one half the damages, this sum exceeding the proceeds of the bark which had been sold and the money paid into court. It was decided that the owners of the tug were liable for one half the damage without credit for the proceeds of the bark.[23] Again, the damages will be apportioned although a tug towing a vessel was negligent in colliding with a submerged obstruction in the draw of a bridge, where the contractors should have uncovered such obstruction.[24] And in case of mutual fault, if one vessel is compelled to pay in excess of half to innocent sufferers, for the other vessel, it may retain the excess out of moneys payable to the other vessel's owners, notwithstanding the limitation of liability of the latter is defeated in part by such deduction.[25]

§ 959. Damages for collision—Right to share in distribution of proceeds of sale by nonlitigant.—If one of two parties injured by a collision institutes proceedings against the vessel in fault, and at his own expense prosecutes his suit to condemnation of the vessel, or of the proceeds of her sale in the registry, another party injured by the same collision, who has contributed nothing to the litigation to establish the vessel's liability, but has stood by during the contest and taken no part in it, cannot share in the proceeds of sale of the vessel until the claim of the first party is satisfied in full.[26]

[21] Re Central R. of New Jersey (U. S. D. C. D. N. Y.), 95 Fed. 700.

[22] The City of Hartford and The Unit, 97 U. S. 323; 24 L. Ed. 930.

[23] The Morgengry, 69 L. J. Prob. 3; 48 Week. Rep. 121; 81 L. J. (N. S.) 417.

[24] Vessel Owners T. Co. v. Wilson (U. S. C. C. A. 7th C.), 11 C. C. A. 366; 66 Fed. 626.

[25] The Job T. Wilson (U. S. D. C. D. Md.), 84 Fed. 204. See The Englishman and the Australia (1894), P. 239.

[26] Woodworth v. Insurance Co., 5 Wall. (U. S.) 87.

§ 960. When damages not apportioned—Division of damages.—The loss will not be apportioned because of a vessel's weakness, and that the damage would have been less had she been strong.[27] And in case of a collision between a large and fast and a small but slow steamer, a minor fault of the latter does not make a case for division of damages where such fault bore but little proportion to many faults of the large steamer.[28] Nor will the damages be divided in case of a collision between an anchored vessel, acting according to the rules, and another boat admittedly at fault, merely upon a surmise that the former might have so acted as to prevent the disaster.[29] And the facts of the case may be such as to raise too much doubt about the fault of one vessel to justify an apportionment of damages.[30] Nor will they be divided where one of the vessels was not at fault, under the circumstances of the case, or where her fault, if any, did not contribute to the collision.[31]

§ 961. Same subject continued—Common-law courts.—The admiralty rule as to a division of damages is not applicable in the courts of common law,[32] for at the common law neither can recover where both vessels are at fault for a maritime collision;[33] and this rule will be applied, where it affirmatively appears that the collision was occasioned by naval officers' negligence, and the case is submitted to the court of claims by special act, making provision for judgment.[34]

§ 962. Collision—Measure of damages—General rule.—Restitutio in integrum is the leading maxim as to the measure of damages in cases of libel in admiralty for injury to vessels for collision.[35] And the true measure of compensation to an in-

[27] Boston Towboat Co. v. Pettie (U. S. C. C. A. 2d C.), 1 U. S. App. 57; 49 Fed. 464.

[28] The Great Republic, 23 Wall. (U. S.) 20.

[29] The Howard B. Peck (U. S. D. C. D. Conn.), 48 Fed. 334.

[30] The Delaware, 161 U. S. 459.

[31] The Umbria, 166 U. S. 404.

[32] Artic F. Ins. Co. v. Austin, 69 N. Y. 470.

[33] New York Harbor T. Co. v. New York L. E. & W. R. Co., 148 N. Y. 574; 42 N. E. 1086, rev'g 76 Hun (N. Y.), 258; 59 N. Y. St. R. 125; 27 N. Y. Supp. 745. See also Rathbun v. Payne, 19 Wend. (N. Y.) 399.

[34] St. Louis & M. V. Trans. Co. v. United States, 33 Ct. Cl. 251.

[35] The Baltimore, 8 Wall. (U. S.) 377; The Cayuga, 14 Wall. (U. S.) 270.

nocent party is damages to the full amount of the loss actually suffered by him;[36] or where the vessel and cargo are lost, the actual value,[37] or the full value of the vessel and of her freight,[38] or the value of the vessel,[39] or the actual damages sustained by the party at the time and place of the injury.[40] Again, the maritime law of the United States, as found in the statute, is the same as the general maritime law of Europe, and is different from that of Great Britain, in this, that the former gauges the liability by the value of the ship and freight after loss or injury, and the latter by their value before the loss or injury, at an amount not exceeding a certain rate per ton.[41]

§ 963. Collision—Measure of damages—What allowed.—Failure to take a disabled vessel into an immediate port for repairs does not, unless the master acted dishonestly or ignorantly, preclude the allowance, as an item of damages, of the expenses of towage services to the home port through dangerous waters, where the vessel is unable to continue her navigation.[42] And where a finding of the value of towage services is based upon conflicting evidence, it will not be disturbed on appeal.[43] So necessary towage expense for the purpose of repairs,[44] and wharfage, while being repaired, will be allowed;[45] as will also the cost of a survey;[46] expenses necessarily incurred in

[36] The "Atlas," 93 U. S. 302; Smith v. Burnett (D. C. App.), 10 App. D. C. 469; 25 Wash. L. Rep. 247.

[37] The Appollon, 9 Wheat. (U. S.) 362. See secs. 975–977, herein.

[38] The Ann Caroline, 2 Wall. (U. S.) 538; The Rebecca, Blatchf. & H. Adm. (U. S.) 347; The New Jersey, Olc. Adm. (U. S.) 444. See secs. 975–977, 994, *post*, herein.

[39] The Ann Caroline, 2 Wall. (U. S.) 538. See secs. 975–977, herein.

[40] Smith v. Condry, 1 How. (U. S.) 28; Myers v. Perry, 1 La. Ann. 372, holding also that the damages must be confined to the immediate and direct consequences of the occurrence, although it is decided that consequential damages cannot be recovered. Fitch v. Livingston, 4 Sand. (N. Y.) 492. See secs. 975–977, herein.

[41] The Scotland, 105 U. S. 24; The City of Norwich, 118 U. S. 468.

[42] The Benjamin F. Hunt, Jr. (U. S. D. C. D. Mass.), 34 Fed. 816.

[43] The Charles E. Wiswall (U. S. C. C. A. 6th C.), 30 C. C. A. 339; 57 U. S. A. 179; 86 Fed. 671; 42 L. R. A. 85, aff'g 74 Fed. 802.

[44] The Bulgaria (U. S. D. C. N. D. N. Y.), 83 Fed. 312; Fitch v. Livingston, 4 Sand. (N. Y.) 492.

[45] Fitch v. Livingston, 4 Sand. (N. Y.) 492.

[46] The Bulgaria (U. S. D. C. N. D. N. Y.), 83 Fed. 312.

retaining the crew;[47] salvage charges which the vessel has been compelled to pay;[48] expenses incurred in attempting to save the cargo,[49] or in attempting to raise the vessel in order to ascertain what may be saved from the wreck;[50] the cost of a readjustment of a compass, necessitated by putting new iron plates upon the ship, the expense of a master's protest in a foreign port and of a new rating at Lloyd's;[51] and ability to earn a bounty.[52]

§ 964. Collision—Measure of damages—What not allowed.—Commissions on money disbursed in repairs, even though there is a custom of shippers to allow the same, will not be allowed, nor will the cost of a new main lower cap, injured before the collision so as to imperil the voyage;[53] nor will the expense of overhauling the compass;[54] nor the entire cost of a rotten and unfit bowsprit, in respect to which the vessel was unseaworthy, but the cost will be divided;[55] nor, where the expense of another boat to take the injured vessel's place is allowed;[56] nor where the repairs to a tug take a long time and the cost was known at the outset to be a large sum, will the wages of the crew be allowed;[57] nor incidental expenses and the expenses of a witness while instructing counsel;[58] nor the pay of a day and night watchman while the vessel was on the dry dock;[59] nor the value of machinery which could have been saved had the salvage not been needlessly abandoned;[60] nor the cost of services of another than

[47] Hoffman v. Union F. Ins. Co., 68 N. Y. 385; 4 Hun, 274. But see next following section herein.

[48] Greenwood v. The Fletcher (U. S. D. C. S. D. N. Y.), 42 Fed. 504.

[49] Hoffman v. Union F. Ins. Co., 68 N. Y. 385; 4 Hun, 274.

[50] The Oneida (U. S. D. C. D. W. Va.), 84 Fed. 716.

[51] The Belgenland (U. S. D. C. S. D. N. Y.), 36 Fed. 504.

[52] Fabre v. Cunard S. S. Co. (U. S. C. C. A. N. Y.), 3 C. C. A. 534; 53 Fed. 288, rev'g 40 Fed. 893; 46 Fed. 301. But see next following section herein.

[53] The Glencairn (U. S. D. C. D. Or.), 78 Fed. 379.

[54] The Belgenland (U. S. D. C. S. D. N. Y.), 36 Fed. 504.

[55] The John D. Penrose (U. S. D. C. E. D. Pa.), 86 Fed. 696.

[56] The Santee (U. S. D. C. D. S. C.), 48 Fed. 126.

[57] The Sarah Thorp (U. S. D. C. D. Conn.), 46 Fed. 816.

[58] The Santee (U. S. D. C. D. S. C.), 48 Fed. 126.

[59] Grubbs v. The John C. Fisher (U. S. D. C. W. D. Pa.), 22 Pitts. L. J. N. S. 122.

[60] Boland v. Combination Bridge

the master in superintending repairs, where the latter was actually present during the time and no reason appears why he should not have superintended them himself;[61] nor the value of like services of a part owner, rendered without the co-owners request, there being no evidence of the value thereof, or of the necessity therefor, or of any acceptance of his bill or promise to pay by said co-owners;[62] nor the loss of a bounty.[63] And where the capsizing of a schooner in tow after a collision is prima facie due to mismanagement, which presumption is unexplained, the additional damage and expense caused by such capsizing will not be allowed for the collision.[64]

§ 965. Collision—Depreciation in vessel.—Reasonable allowance may be made for depreciation not covered by repairs,[65] but if an allowance is claimed for permanent depreciation, there should be positive proof thereof;[66] nor will depreciation be allowed upon insufficient proof of the amount in dollars and cents, especially in the absence of a claim therefor in the libel.[67] But in the case of a steamboat, her annual depreciation cannot be determined by any fixed rule of ascertainment of value. The allowance of one third new for old is a better method of valuation, although an allowance of ten per cent depreciation will not be increased on appeal. All essential elements should, however, be considered, including such vessel's use, maintenance and state of repair, care taken, and the original materials used, their kind and quality.[68]

Co. (U. S. D. C. N. D. Iowa), 94 Fed. 888.

[61] The Glencairn (U. S. D. C. D. Or.), 78 Fed. 678.

[62] The State of California (U. S. C. C. A. 9th C.), 54 Fed. 404.

[63] Fabre v. Cunard S. S. Co. (U. S. C. C. A. N. Y.), 3 C. C. A. 534; 53 Fed. 288, rev'g 40 Fed. 893; 46 Fed. 301. See The Umbria, 166 U. S. 404; 17 Sup. Ct. 610; 41 L. Ed. 1053. But see next preceding section herein.

[64] Gilkey v. The Beta (U. S. D. C. N. Y.), 44 Fed. 389.

[65] New York, N. H. & H. R. Co. v. The Heligoland (U. S. D. C. N. Y.), 79 Fed. 123. See Joyce on Ins. (ed. 1897) secs. 3077–3095.

[66] Coffin v. The Osceola (U. S. D. C. N. Y.), 34 Fed. 921. When nothing allowed for permanent depreciation. Coffin v. The Osceola (U. S. D. C. N. Y.), 34 Fed. 921; The Excelsior (U. S. D. C. N. Y.), 17 Fed. 924.

[67] Grubbs v. The John C. Fisher (U. S. D. C. W. D. Pa.), 22 Pitts. L. J. N. S. 122. Vessel here was ten years old.

[68] The J. E. Trudeau (U. S. C. C. A. La.), 4 C. C. A. 657; 54 Fed. 907,

§ 966. Damages—Old, decayed or unseaworthy vessel.—In case of collision or other injury to a vessel, or a vessel and cargo, the facts that she was old, decayed, improperly constructed, unseaworthy or not stanch, will affect the amount of recovery,[69] even to the extent of precluding any decree, especially where the proof is slight and is overcome by circumstances.[70]

§ 967. Collision—Cost of raising and repairs.—Where repairs are practicable, the general rule is that the damages shall be sufficient to restore the injured vessel to the condition in which she was at the time the collision occurred,[71] and if the vessel is raised and repaired, the actual cost incurred,[72] or as it has been also decided the cost of full repairs is the true measure of damages.[73] These rules do not allow any deduction, as in insurance cases, for new materials furnished in place of the old.[74] And although it is decided that the actual cost of repairs is all that can be recovered,[75] nevertheless, said rules are not exclusive of other elements of damages in addition to the cost of raising and repairs, or of repairs.[76] So the cost of repairs is the measure of damages for injury caused by the unsafe condition of the bottom

aff'g 48 Fed. 847. But see as to one third new for old, sec. 967, herein, as to repairs.

[69] The S. O. Pierce (U. S. D. C. S. D. N. Y.), 40 Fed. 767; Cornwall v. The New York (U. S. D. C. S. D. N. Y.), 38 Fed. 710; The Gilson, 35 Fed. 333; The Gazelle (U. S. D. C. N. D. Ill.), 33 Fed. 301. See sec. 967, herein, as to repairs.

[70] The S. O. Pierce (U. S. D. C. S. D. N. Y.), 40 Fed. 767. Examine The Gilson, 85 Fed. 333.

[71] The Baltimore, 8 Wall. (U. S.) 377. See also Williamson v. Barrett, 13 How. (U. S.) 101. See also Fitch v. Livingston, 4 Sand. (N. Y.) 492.

[72] The Catharine v. Dickinson, 17 How. (U. S.) 170. See also Mailler v. Express P. Line, 61 N. Y. 312.

[73] The Heather Belle, 3 Can. Exch. 40.

[74] The Baltimore, 8 Wall. (U. S.) 377. But see The J. E. Trudeau (U. S. C. C. A. La.), 4 C. C. A. 657; 54 Fed. 907, aff'g 48 Fed. 907. As to "Repairs—Fifty per-cent rule" and "One-third new," see Joyce on Ins. (ed. 1897) secs. 1553, 2702, 3040–3119; Desty's Ship. & Adm. (ed. 1879) sec. 398.

[75] The City of Chester (U. S. D. C. S. D. N. Y.), 34 Fed. 429.

[76] The Potomac, 105 U. S. 630; Williamson v. Barrett, 13 How. (U. S.) 101; The Ernest A. Hamill, 100 Fed. 309; The Ohio (U. S. C. C. A. 6th C.), 33 C. C. A. 667; 62 U. S. App. 88; 91 Fed. 547; The Rabboni (U. S. C. C. D. Me.), 53 Fed. 952, aff'g 53 Fed. 948; H. M. Loud & Sons v. Peter, 20 Ohio Cir. Ct. R. 73; 11 O. C. D. 155.

of a pier, and not the difference between the vessel's value before and after the injury.[77]

§ 968. Same subject continued.—If a vessel be sunk in so deep water, or otherwise so sunk, that the expense of raising and repairing her would be equal to, or greater than her worth when repaired, the rule first above stated does not apply,[78] although this last statement does not preclude damages where the cost of repairs equals fully, but does not exceed the vessel's value, so as to indicate improvidence.[79] Again, where there are evident injuries, notwithstanding repairs, an allowance of a certain per cent of the value of the boat is proper, where full repairs would have been attended with more expense than the sum allowed.[80] Nor is the sum which it will take to repair her an incorrect rule of damages for collision to an old barge of a peculiar structure and capacities of usefulness, and from these causes not having any established market value in the port where she was injured.[81] And if a vessel could not have been raised and repaired without a large expenditure of time and money, the fact that she was finally raised and repaired, and put in good condition, is no defense to a claim for total loss, especially where it does not appear at whose instance or at what cost this was done, nor by what right those in possession hold her, and it being neither alleged nor proved that she had been tendered back to her original owners.[82] Again, if a vessel is sunk in shallow water, and can be easily raised and repaired at less expense than her value, only the cost of raising and repairing, to be done within a reasonable time, and not her value as for a total loss can be recovered.[83] But the increased cost of repairs, owing to latent unsoundness, is not recoverable.[84]

[77] Union Ice Co. v. Crowell (U. S. C. C. A. 1st C.), 55 Fed. 87.

[78] The Baltimore, 8 Wall. (U. S.) 377.

[79] The Rabboni (U. S. C. C. D. Me.), 53 Fed. 952, aff'g 53 Fed. 948.

[80] The Heligoland (U. S. D. C. S. D. N. Y.), 79 Fed. 123. See Joyce on Ins. (ed. 1897) secs. 3041, 3105.

[81] The Granite State, 3 Wall. (U. S.) 310. See The Gazelle, 33 Fed. 301. See Joyce on Ins. (ed. 1897) sec. 2750. But see The Rhode Island, 1 Blatchf. (U. S.) 363; The W. H. Clark, 5 Biss. (U. S.) 310.

[82] The Falcon, 19 Wall. (U. S.) 75.

[83] The Thomas P. Wray (U. S. D. C. N. Y.), 28 Fed. 526.

[84] The Providence; Pearce v. Old Colony S. S. Co. (U. S. C. C. A. Mass.), 38 C. C. A. 670; 98 Fed. 133.

§ 969. Same subject concluded.—If a vessel is repaired at another place than that of the injury, and at a less cost than the estimate made at the latter place, the cost where repairs were actually made is the measure of damages, for the insurance rule requiring repairs at the place of injury or nearest port does not apply.[85] So an owner is not obligated to accept an offer to repair made at the dock, where the cost is greater than the amount of an offer made at the time by responsible parties, and the cost of temporary repairs and of transfer to the dock to complete the same. And the latter amount can be recovered as damages, even though still another offer is made but not communicated to said owner in time.[86] But the facts that the cost of repairs is high, and that the vessel is more valuable thereafter than when the accident occurred, does not limit the recovery of damages, nor will an allowance be made for her enhanced value, for the owner is entitled to the benefit, where he was justified in having the vessel repaired and had used all reasonable care as to the same and the cost thereof.[87] Again, where a vessel is sold in her damaged state by the owner, he cannot recover for repairs which were made by the purchaser, and which did not restore her to her former condition, when the reason is that the repairing was not properly done.[88]

§ 970. Evidence as to cost of repairs as basis of damages.—The cost of repairs is competent evidence of damages;[89] but

[85] The City of Chester (U. S. D. C. S. D. N. Y.), 34 Fed. 429. See Joyce on Ins. (ed. 1897) secs. 3058, 3076, 3111, 3454.

[86] The M. Kalbfleisch (U. S. D. C. E. D. N. Y.), 59 Fed. 198.

[87] Loud & Sons L. Co. v. Peter, 20 Ohio. Civ. Ct. R. 73; 11 O. C. D. 155; Desty's Ship & Adm. (ed. 1879) sec. 398, citing The Santee, 6 Blatchf. (U. S.) 1; The Pactolus, Swa. Adm. (U. S.) 173; The Baltimore, 8 Wall. (U. S.) 386; The Clyde, Swa. Adm. (U. S.) 23; The Catharine v. Dickinson, 17 How. (U. S.) 170. See The Rabboni (U. S. C. C. D. Me.), 57 Fed. 952.

[88] In re Merritt & Chapman D. & W. Co. (U. S. D. C. D. Conn.), 103 Fed. 988. See further as to cost of repairs, etc., The John R. Penrose (U. S. D. C. Pa.), 86 Fed. 696; The Mattie Newman (U. S. D. C. N. Y.), 68 Fed. 1017; The Minnie (U. S. D. C. Conn.), 26 Fed. 860; The J. T. Easton (U. S. D. C. N. Y.), 24 Fed. 95; The Henry M. Clark (U. S. D. C. N. Y.), 22 Fed. 752. The Venus (U. S. D. C. N. Y.), 17 Fed. 925; Joyce on. Ins. (ed. 1897) secs. 3040 et seq.; Desty's Ship & Adm. (ed. 1879) sec. 396.

[89] La Champagne (U. S. D. C. D. N. Y.), 53 Fed. 398. See The Cathar-

if the vessel has been repaired by day's work at a fair price, experts' opinions as to the cost or value of repairs will not furnish a reliable basis for computing the damages.[90]

§ 971. Collision—Cargo—General rules of damages.—Damages resulting to the owner of one of the cargoes of two colliding vessels, mutually in fault, will be equally divided,[91] although each vessel is decided to be liable in solido.[92] So a decree for the whole loss of cargo upon one of two vessels, mutually in fault, will be made against the one which alone is a party to the suit for such loss.[93] But only half the damage to the cargo can be recovered by the owner, where he is also the shipowner,[94] and so, the charterer being owner for the voyage.[95] Although where the owners of a cargo of a steamer, which has been sunk by the mutual fault of two colliding steamers, intervene for their interest in a suit instituted by the owners of the carrying vessel against the other, they are entitled to recover full damages against such other vessel, notwithstanding the damages to such vessels are divided as between themselves.[96] If a recovery is sought by the owner of one of two colliding vessels equally in fault, he having purchased claims for cargo at less than their actual value, the sum actually paid and not the actual value of the cargo is the basis of allowance to him, upon the division of damages.[97]

§ 972. Same subject continued.—The nonliability of a vessel for damage to her own cargo, she being partly in fault, does not preclude her recovery as bailee of the cargo, against another vessel for such loss.[98] Again, the shipper or consignee of the cargo, who is innocent of all wrong, bears no proportion of the loss, and the owner is entitled to recover his entire dam-

ine v. Dickinson, 17 How. (U. S.) 170.

[90] The Scythian (U. S. D. C. D. N. J.), 83 Fed. 1016. See secs. 965–977, herein as to total loss and abandonment.

[91] The Sam Brown (U. S. D. C. W. D. Pa.), 29 Fed. 650.

[92] The Brittanic (U. S. D. C. S. D. N. Y.), 39 Fed. 395.

[93] The British Queen (U. S. D. C. S. D. N. Y.), 89 Fed. 1003.

[94] The Bristol (U. S. D.C. S. D. N. Y.), 29 Fed. 867.

[95] The Livingstone, 104 Fed. 918.

[96] The New York, 175 U. S. 187.

[97] The Gulf Stream (U. S. C. C. A. 2d C.), 12 C. C. A. 613; 64 Fed. 809.

[98] The Viola (U. S. D C. S. D. N. Y.), 59 Fed. 632.

ages in such case.[99] And where the loss results to the cargo, not from the injury but from the unfit and rotten condition of the boat, a vessel chargeable with the damages for the injury to said boat cannot be held for loss of the cargo.[100] But to justify an allowance of damages for injuries to the cargo, the evidence must be such as to amount to more than a mere surmise as to the amount of loss.[1] And in applying the rule of actual damages, the factor is important that the wrongdoer stands in no contract relation to the party sustaining the injury.[2] Another rule has been stated, and that is that the measure of damages is the difference between the market value of the goods if injured and their value in their damaged condition, without allowance for any rebate of duty for such damaged condition, where the vessel is sunk and part of the cargo recovered and sold, an expense having been incurred in making it salable.[3] Again, the market value of damaged goods is strongly evidenced by sales of cargoes of such merchandise at auction, although this is not an absolute or positive standard. But where libellant employs an expert, compensation therefor will not be allowed as an incident of such sales.[4]

§ 973. Collision—Officers' and crew's effects.—In respect to the recovery of half the damages in cases of mutual fault, the ship's company are identified with their own ship;[5] so that the officers and crew cannot recover from their own boat in such case, and are entitled to but one half the value of their effects lost, by way of damages from the other boat,[6] the damages for such effects being put upon the same ground as loss of cargo, although where the fault is in equipment, full damages are re-

[99] The Atlas, 93 U. S. 302.

[100] Mould v. The New York (U. S. D. C. S. D. N. Y.), 40 Fed. 900.

[1] The State of California (U. S. C. C. A. 9th C.), 54 Fed. 404.

[2] The Sam Brown (U. S. D. C. W. D. Pa.), 29 Fed. 650.

[3] The Umbria (U. S. C. C. A. 2d C.), 8 C. C. A. 194; 1 U. S. App. 612; 59 Fed. 489.

[4] The Marinin (U. S. C. C. S. D. N. Y.), 32 Fed. 918.

[5] The Niagara (U. S. D. C. S. D. N. Y.), 77 Fed. 329.

[6] The Albert Dumois (U. S. C. C. A. 5th C.), 31 C. C. A. 315; 59 U. S. App. 108; 87 Fed. 948; In re Lakeland Trans. Co., 103 Fed. 328; The Job T. Wilson, 84 Fed. 204; The Queen (U. S. D. C. S. D. N. Y.), 40 Fed. 694.

coverable.[7] And where the vessel and master are at fault, the mate and crew who are free from fault will be given priority in damages to the amounts awarded the owner and master.[8] But in awarding damages for the loss of the wardrobe of the wife and child of the captain, a seaman's testimony as to its value will not be followed.[9]

§ 974. Collision—Passenger's effects.—The full value of the effects of a passenger on one of the vessels mutually in fault may be recovered from the other surviving vessel.[10] And so, even though said passenger is upon a pilot boat for pleasure and by invitation, and the navigators of the other vessel had no knowledge or reason to suppose that he was upon said boat.[11] The surviving ship is, however, entitled to recoup one half the amount awarded against it in favor of a sunken vessel.[12]

§ 975. Collision—Total loss — Vessel — Cargo— Abandonment.—In cases of collision, where the injured vessel has been abandoned, the measure of damages is the difference between her value in her crippled condition and her value before the collision. This is to be ascertained by the testimony of experts, who can judge of the probable expense of raising and repairing the vessel; but where the vessel has been actually raised and repaired, the actual cost incurred is the true measure of indemnity.[13] Where the vessel is lost, the measure of damages is also decided to be her value with interest from the time of the loss;[14] or the value on sale in open market;[15] or, in case of a

[7] The Niagara (U. S. D. C. S. D. N. Y.), 77 Fed. 329.

[8] The Chattahoochee (U. S. C. C. A. 1st C.), 21 C. C. A. 162; 33 U. S. App. 510; 74 Fed. 899.

[9] The Oregon (U. S. D. C. D. Or.), 89 Fed. 520.

[10] The Albert Dumois (U. S. C. C. A. 5th C.), 31 C. C. A. 315; 59 U. S. App. 108; 87 Fed. 948.

[11] La Normandie (U. S. C. C. A. 2d C.), 7 C. C. A. 285; 58 Fed. 427.

[12] The Albert Dumois (U. S. C. C. A. 5th C.), 31 C. C. A. 315; 59 U. S. App. 108; 87 Fed. 948.

[13] The Catharine v. Dickinson, 17 How. (U. S.) 170. But see The City of Norwich, 118 U. S. 468; The Scotland, 105 U. S. 24.

[14] Fabre v. Cunard S. S. Co. (U. S. C. C. A. N. Y.), 3 C. C. A. 534; 53 Fed. 288, rev'g 40 Fed. 893; 46 Fed. 301; The Hamilton (U. S. D. C. D. N. Y.), 95 Fed. 84. See The Umbria, 166 U. S. 404; 17 Sup. Ct. 610; 41 L. Ed. 1053.

[15] The Laura Lee (U. S. D. C. La.), 24 Fed. 483.

canal boat and cargo, the value immediately preceding the collision ;[16] or the vessel's market value at the time of the collision ;[17] or in case of a foreign boat, her value at the port of departure.[18] And the value of a French fishing brig is her regular building and market price in France, with interest from the date of collision.[19] Again, the rule that damages should be assessed with reference to time and place is subject to exceptions. So in case of a foreign ship, her value at the home port will prevail where she is destroyed in American waters, where her value is low on account of our navigation laws.[20]

§ 976. Same subject continued.—Where the cargo belongs to the owners of the vessel, the market value at the port of sailing, of both vessel and cargo with interest from the time of sailing, has been decided to be the measure of compensation for a total loss at sea occasioned by the other vessel's fault in colliding.[21] So the value or cost at the port of shipment of a cargo totally lost, has been declared the measure of recovery ;[22] or the value of the vessel, cargo, freight and personal effects before collision, notwithstanding the vessel is raised and repaired at an expense exceeding her value before the injury or after repairs, and a stipulation is refused by the colliding vessel that there is a total loss.[23] There may also be included in

[16] The Ant (U. S. D. C. N. J.), 13 Fed. 91.

[17] The Heather Belle, 3 Can. Exch. 40; The Sam Brown (U. S. D. C. W. D. Pa.), 29 Fed. 650. See The Baltimore, 8 Wall. (U. S.) 386; The Mary Caroline, 3 Wm. Rob. Adm. 101; The Granite State, 3 Wall. (U. S.) 310; The Rebecca, Blatchf. & H. (U. S.) 347; Cramer v. Allen, 5 Blatchf. (U. S.) 248; The Ann Caroline, 2 Wall. (U. S.) 538; The Colorado, 1 Brown's Adm. 412; Dyer v. National S. S. Co., 7 Ben. (U. S.) 395.

[18] The Utopia (U. S. D. C. N. Y.), 16 Fed. 507.

[19] Guibert v. The British Ship George Bell (U. S. D. C. D. Md.), 3 Fed. 581.

[20] The Blenheim (U. S. C. C. Mass.), 17 Fed. 608.

[21] The Beatrice Havener (U. S. D. C. E. D. N. Y.), 50 Fed. 232. See as to the objection that owners of vessels are not owners of cargo, Commander in Chief, 1 Wall. (U. S.) 43.

[22] The Umbria (U. S. C. C. A. 2d C.), 8 C. C. A. 194; 1 U. S. App. 612; 59 Fed. 489. See The Vaughn and Telegraph, 14 Wall. (U. S.) 258; Smith v. Condry, 1 How. (U. S.) 28; Swift v. Brownell, 1 Holmes (U. S.), 467; The Glaucus, 1 How. (U. S.) 37.

[23] The Havilah (U. S. C. C. A. 2d C.), 1 U. S. App. 138; 50 Fed. 331.

case of total loss of vessel and cargo, expenses, cost of equipment for the voyage, wages and interest from the time of supplying or paying the same;[24] or, where the cargo is a total loss, expenses, charges, insurance and interest.[25] The mere fact, however, that a vessel is sunk is not of itself sufficient to show that the loss is total, nor to justify the master and owner in abandoning her and her cargo.[26] Another rule of damages, in case of goods lost or destroyed on the high seas by the fault of those in charge, is the price or value of the goods at the place of shipment, with all charges of lading, insurance, transportation and interest, without any allowance for anticipated profits. When goods have no market value at the place of shipment resort may be had to other means of ascertaining their actual value, such as the price which they usually bring at the port of destination with a fair deduction for profits and charges.[27]

§ 977. Same subject continued—Evidence of value.—The cost of construction is competent evidence of market value, but if the vessel could be duplicated for a less sum, the whole cost is not recoverable where it includes changes and improvements.[28] Again, the finding of a commissioner as to the value of a vessel lost in collision is entitled to great respect.[29]

§ 978. Exemplary damages.—In case of a suit in rem against a vessel for collision, there can be no recovery of exemplary damages,[30] nor is an excessive demand allowable by way of

See as to consignee's liability and rights in recovery, O'Brien v. Miller, 168 U. S. 287.

[24] The Beatrice Havener (U. S. D. C. E. D. N. Y.), 50 Fed. 232.

[25] The Umbria (U. S. C. C. A. 2d C.), 8 C. C. A. 194; 1 U. S. App. 612; 59 Fed. 489. See The Anna Maria, 2 Wheat. (U. S.) 327; The Appollon, 9 Wheat. (U. S.) 362.

[26] The Baltimore, 8 Wall. (U. S.) 377.

[27] The Scotland, 105 U. S. 24.

[28] The City of Alexandria (U. S. D. C. N. Y.), 40 Fed. 697.

[29] The Gertrude (U. S. D. C. D. R. I.), 112 Fed. 448, citing The Elton, 31 C. C. A. 496; 83 Fed. 519, 520; The Cayuga, 8 C. C. A. 188; 59 Fed. 483, 488; Callaghan v. Myers, 128 U. S. 617, 666; 9 Sup. Ct. 177; 32 L. Ed. 547; Kimberly v. Arms, 129 U. S. 512, 524, 525; 9 Sup. Ct. 355; 32 L. Ed. 764.

[30] The William H. Bailey, 103 Fed. 799; Seabrook v. Raft (U. S. D. C. S. C.), 40 Fed. 596. See The Lotty Olcott (U. S. D.), 329; Steamboat Co. v. Whildin, 4 Har. (Del.) 228; Myers v. Perry, 1 La. Ann. 372.

punishment.[31] If, however, the collision is wilful, exemplary damages are recoverable.[32] Again, on an illegal seizure, the original wrongdoers may be held liable beyond the loss actually sustained in case of gross and wanton outrage, but the owners of a privateer, who are only constructively liable, are not bound to the extent of vindictive damages.[33] And in case a tug is detained, after termination of the charter, for failure to pay the hire, exemplary damages will not be allowed.[34]

§ 979. Demurrage—Relation of to damages—Definition of.—Demurrage, in the sense that it is a compensation for a loss occasioned by detention of a vessel, sustains a certain relation to damages, although strictly defined, it is rather a reward or an extended freight to a vessel for the earnings she is improperly caused to lose for the delay in port for loading or unloading, while in a general sense every unproper detention is a demurrage for which compensation is recoverable.[35]

§ 980. Demurrage—Generally.—Demurrage is generally a matter of contract,[36] and should be expressly reserved by a charter

[31] The Stelvio, 34 Fed. 431.

[32] Ralston v. The State Rights, Crabbe, 23 Fed. Cas. No. 11,540; Steamboat Co. v. Whildin, 4 Har. (Del.) 228; The Newhall, 3 Ware (U. S.), 105. "The doctrine is well settled, that in actions of tort, the jury, in addition to the sum awarded by way of compensation for the plaintiff's injury, may award exemplary, punitive or vindictive damages, sometimes called smart money, if the defendant has acted wantonly or oppressively, or with such malice as implies a spirit of mischief or criminal indifference to civil obligations." Lake Shore R. R. v. Prentice, 147 U. S. 101, 107.

[33] The Amiable Nancy, 3 Wheat. (U. S.) 546.

[34] The Mascotte (U. S. D. C. D. N. J.), 72 Fed. 684.

[35] Neilsen v. Jesup (U. S. D. C. E. D. Pa.), 30 Fed. 138. See also Sprague v. West, Abb. Adm. 354; cited Desty's Ship. & Adm. (ed. 1879) sec. 246; Anderson's Dict. L., citing Donaldson v. McDowell, 1 Holmes (U. S.), 292, per Shepley, J., and other cases.

[36] Ten Thousand and Eighty-two Oak Ties (U. S. D. C. D. N. J.), 87 Fed. 935. See notes as to "Demurrage," 46 C. C. A. 4. "Demurrage" on cars, 22 L. R. A. 530.

See as to clauses; as fast as she can receive, Durchmann v. Dunn (U. S. C. C. A. N. Y.), 46 C. C. A. 62; 106 Fed. 950; 101 Fed. 606. *For discharge as fast as the vessel can deliver*, The Glenfinlas (U. S. C. C. A. 2d C.), 1 U. S. App. 22; 1 C. C. A. 85; 48 Fed. 758; The Nether Holme (U. S. D. C. S. D. N. Y.), 50 Fed. 434. For *dispatch in unloading* but not providing for *dispatch at the port*

or bill of lading in order to be recoverable, although the right thereto may arise from an implied contract that the loading and discharge will be done in a reasonable time and with reasonable

of shipment, Corrigan v. Iroquois Furnace Co. (U. S. C. C. A. Ill.), 41 C. C. A. 102; 100 Fed. 870. *Quick dispatch*, Mott v. Frost (U. S. D. C. E. D. S. C.), 47 Fed. 82; Freeman v. Wellman (U. S. D. C. D. Mass.), 67 Fed. 796; Harrison v. Smith (U. S. C. C. A. 3d C.), 67 Fed. 354. "*Discharge with the usual quick despatch*," Baldwin v. Stamford Mfg. Co., 2 N. Y. Supp. 13. "*Customary dispatch in discharging*," Milburn v. 35,000 Boxes of Oranges and Lemons (U. S. C. C. A. 2d C.), 6 C. C. A. 317; 57 Fed. 236; Seager v. N. Y. & C. Mail S. S. Co. (U. S. C. C. A. 2d C.), 55 Fed. 880, aff'g 55 Fed. 324. The Giulio, 34 Fed. 909. *Discharge* "*with all dispatch as customary*," how far affected by custom or usage, Lyle Shipping Co. v. Cardiff Corp., 69 Law J. Q. B. 889; (1900) 2 Q. B. 638; 83 L. T. N. S. 329; 49 Wkly. Rep. 85; 5 Com'l Cas. 397. *Delivery* "*as soon as possible*," Egan v. Barclay Fibre Co. (U. S. D. C. S. D. N. Y.), 61 Fed. 527. *When no provision for* "*dispatch*" in discharging, Bartlett v. Cargo of Lumber (U. S. D. C. E. D. N. Y.), 41 Fed. 890. "*Colliery guaranty*," Dobell v. Green, 69 Law J. Q. B. 454; (1900) 1 Q. B. 526; 82 Law T. N. S. 314; 9 Asp. 53; Shamrock S. S. Co. v. Storey, 81 Law T. N. S. 413; 8 Asp. 590; Saxon S. S. Co. v. Union S. S. Co., 68 L. J. Q. B. 914; 81 L. T. N. S. 246, rev'g (1899) 8 Asp. 449.

See as to "*working days*," "*Sundays*" *and* "*holidays*," Hagerman v. Norton (U. S. C. C. A. Fla.), 46 C. C. A. 1; 105 Fed. 996 (working days); Uren v. Hagar (U. S. D. C. E. D. Pa.), 95 Fed. 493 (holidays); The India (U. S. C. C. A. 5th C.), 2 U. S. App. 83; 1 C. C. A. 174; 49 Fed. 76 ("weather working days"); The Unionist (U. S. D. C. E. D. Va.), 48 Fed. 315 (Christmas day; loading on holidays); Baldwin v. Sullivan Timber Co., 142 N. Y. 279; 58 N. Y. St. R. 785; 36 N. E. 1060, aff'g 48 N. Y. St. R. 296; 20 N. Y. Supp. 496 (when Sundays not to be deducted); Rigney v. White, 4 Daly (N. Y.), 400 (Sundays excluded); Forest S. S. Co. v. Iberian Iron Co., 81 Law T. N. S. 563; 9 Asp. 1; 5 Com'l Cas. 83, aff'g Rhymey S. S. Co. v. Iberian Iron-Ore Co., 79 Law T. N. S. 240; 8 Asp. 438; Re Glendevon (Div. Ct.), [1893] P. 269 (Sundays and fete days excepted); Pyman v. Dreyfus, L. R. 24 Q. B. D. 152 ("Twelve running days [Sundays excepted]" for loading and discharging). "*Running days*" mean calendar days. The Katy (C. A.), [1895] P. 56; 64 L. J. P. D. & A. (N. S.) 49.

See as to lay days in general, Hagar v. Elmslie (U. S. C. C. A. Pa.), 46 C. C. A. 446; 107 Fed. 511; The St. Bernard (U. S. D. C. N. Y.), 105 Fed. 994; Elmslie v. Hagar (U. S. D. C. Pa.), 101 Fed. 840; The Assyria (U. S. C. C. A. Fla.), 39 C. C. A. 97; 98 Fed. 316; Bowen v. Sizer (U. S. D. C. S. D. N. Y.), 93 Fed. 227; Smith v. Lee (U. S. C. C. A. 1st C.), 13 C. C. A. 506; 66 Fed. 344; McLeod v. 1,600 Tons of Nitrate of Soda (U. S. D. C. D. Cal.), 55 Fed. 528; Sorensen v. Keyser (U. S. C. C. A. 5th C.), 2 U. S. App. 297; 2 C. C. A. 650; 52 Fed. 163; The Scandinavia (U. S. D. C. N. D. Cal.), 49 Fed. 658; Bellatty v. Curtis (U. S. D. C. D. Mass.), 41 Fed. 479; Rumball v.

diligence,[37] and therefore, where the delay is for a long and unreasonable time, demurrage is a legitimate element of damages.[38] Again, a distinction has been made between demurrage arising under a special contract, and recovery therefor, occasioned by improper detention, without agreement.[39] And where the charter is silent upon the subject, the measure of damages for delay in loading is the stipulated demurrage for delay in discharging.[40] If, however, the consignee cannot control the use of the wharf, and the custom is for vessels to there await their turn, the shipowner must expressly provide in the charter party for the con-

Ping, 34 Fed. 665; The Ottawa, 33 Fed. 52; Rowe v. Smith, 10 Bos. (N. Y.) 268; Saxon S. S. Co. v. Union S. S. Co., 69 Law J. Q. B. 907; 83 C. T. N. S. 106; 5 Com'l Cas. 381; The Katy (C. A.), [1895] P. 56; 64 L. J. P. D. & A. (N. S.) 49; Budgett v. Bennington, L. R. 25 Q. B. D. 320; Pyman v. Dreyfus, L. R. 24 Q. B. D. 152; Oakville S. S. Co. v. Holmes, 48 Wkly. Rep. 152; Cushing v. McLeod (Can.), 2 N. B. Eq. 63. *See as to payment of a certain sum per day* as demurrage, Gabler v. McChesney, 60 App. Div. (N. Y.) 583; 70 N. Y. Supp. 191.

See as to defenses to and release or discharge of demurrage claims in general, Durchmann v. Dunn (U. S. D. C. N. Y.), 101 Fed. 606; Uren v. Hagar (U. S. D. C. E. D. Pa.), 95 Fed. 493; The James Baird (U. S. D. C. D. Mass.), 90 Fed. 669; James v. Brophy (U. S. C. C. A. 1st C.), 33 U. S. App. 330; 18 C. C. A. 49; 71 Fed. 310; Burrill v. Crossman (U. S. D. C. S. D. N. Y.), 65 Fed. 104; McKeen v. Morse (U. S. C. C. A. 2d C.), 1 U. S. App. 7; 1 C. C. A. 237; 49 Fed. 253; Re Richardson & S. & Co., 66 L. J. Q. B. N. S. 579, aff'd (C. A.) 77 Law T. Rep. 479; 66 L. J. Q. B. N. S. 868; [1898] 1 Q. B. 261; Furness v. Forwood (Q. B.), 77 Law. T. Rep. 95. See also cases under sec. 982 herein, as to strikes. See as to insufficient *tender*, of vessel under charter, to entitle her to compensation for delay, Gould v. Graffin (U. S. D. C. D. Md.), 62 Fed. 605.

[37] Empire Transp. Co. v. Philadelphia & R. C. & I. Co. (U. S. C. C. A. 8th C.), 40 U. S. App. 157; 23 C. C. A. 564; 77 Fed. 919; 35 L. R. A. 623; Van Etten v. Newton, 134 N. Y. 143; 45 N. Y. St. R. 768; 31 N. E. 334, aff'g 15 Daly, 538; 25 N. Y. St. R. 751; 6 N. Y. Supp. 531; Jameson v. Sweeney, 61 N. Y. Supp. 498; 29 Misc. 584; Cross v. Beard, 26 N. Y. 85; Wordin v. Bemis, 32 Conn. 268; 85 Am. Dec. 255; Hall v. Barker, 64 Me. 339. See The Mary Riley v. 3,000 Railroad Ties (U. S. D. C. E. D. Pa.) 38 Fed. 254; note 41 L. Ed. (U. S.) 937.

[38] Pierce v. Walton, 20 Ind. App. 66; 50 N. E. 309; Dayton v. Parke, 142 N. Y. 391; 59 N. Y. St. R. 788; 37 N. E. 642, rev'g 67 Hun, 137; 51 N. Y. St. R. 542; 22 N. Y. Supp. 613. See The Saginaw (U. S. D. C. S. D. N. Y.), 95 Fed. 703.

[39] Russell v. Wilkesbarre C. & I. Co., 7 Alb. L. J. 28.

[40] So held in Baldwin v. Sullivan Timber Co., 48 N. Y. St. R. 296; 20 N. Y. Supp. 496. See Durchmann v. Dunn, 46 C. C. A. 62; 106 Fed. 950; Clink v. Radford (C. A. 1891), 1 Q.

signee's liability for delay in loading or unloading.[41] So where the consignee is the freighter and cargo owner, and the bill of lading is silent as to demurrage or lay days, he is liable for unnecessary detention in unloading.[42] And the remedy of the carrier in case of the consignee's negligence in removing goods within a reasonable time, is by an action in the nature of a claim for demurrage.[43] Again, where delay in unloading is caused by the freighter's negligence, damages are recoverable from him in the nature of demurrage.[44] A sum due, however, to the plaintiff as demurrage cannot be added to the original judgment on appeal, where the amount is one of fact upon which a jury may be demanded.[45]

§ 981. Demurrage—Computation of and measure of allowance—Generally. — In computing demurrage due under a charter party, the value of the use of the vessel may be allowed for her detention, and to show her net value per day evidence of the expenses of the voyage and the time it has taken, including loading and unloading, is competent. There may also be included as damages in the demurrage charge, or allowed as a separate item, the wharfage charges, necessary commissions and interest.[46] Again, the probable net earnings of a vessel during the period of detention is the rule of damages for unreasonable or undue delay in unloading a vessel, but this does not include a subsequent period, even though future employment is lost by the close of the season of navigation.[47]

§ 982. Demurrage—Act of God—Vis major, public enemies, restraints of rulers, etc.; bad weather, strikes, etc.—

B. 625; Dunlop v. Balfour (C. A., 1892), 1 Q. B. 507.

[41] Flood v. Crowell (U. S. C. C. A. 5th C.), 63 U. S. App. 493; 34 C. C. A. 415; 92 Fed. 402.

[42] Empire Transp. Co. v. Philadelphia, C. & I. Co. (U. S. D. C. D. Minn.), 70 Fed. 268. See Scholl v. Albany & R. I. S. Co., 101 N. Y. 602; 5 N. E. 782.

[43] Crommelin v. New York & H. R. Co., 4 Keyes (N. Y.), 90; 1 Abb. Dec. (N. Y.) 472, aff'g 10 Bosw. (N. Y.) 77.

[44] Shaver v. Gillespie, 46 N. Y. St. R. 771; 19 N. Y. Supp. 237.

[45] Dayton v. Parke, 142 N. Y. 391; 59 N. Y. St. R. 788; 37 N. E. 642, rev'g 67 Hun, 137; 51 N. Y. St. R. 542; 22 N. Y. Supp. 613.

[46] The Jas. A. Dumont (U. S. D. C. S. D. N. Y.), 34 Fed. 428.

[47] Huron Barge Co. v. Turney (U. S. D. C. N. D. Ohio), 79 Fed. 109.

While the act of God constitutes an excuse to common carriers,[48] other factors may also, when combined therewith, excuse liability for rescission of a contract because of delay.[49] And where by reason of public enemies the consignees are prevented from removing the cargo, no demurrage is recoverable,[50] although demurrage may be recoverable notwithstanding acts of the public enemy.[51] And if neither the government nor insurgent parties interfere with the selling or loading of cargo, the charterers are liable, even though the charter party excepts acts of God, enemies, etc., and the sellers of the article to be loaded refuse to furnish cargo, because the property is in possession of said insurgents, and also because they may be held liable for additional export duty and dealt with as for treasonable acts.[52] Quarantine regulations are, however, within an exception of liability for delays occasioned by restraint of rulers, princes and people, although upon the expiration of detention, occasioned by such regulations, the vessel must proceed to her port as soon as possible.[53] So, if delay occasioned by strikes is excepted, the charterer is not liable for damages for delay so caused,[54] and a strike of dock laborers may excuse a charterer's liability to shipowners for delay.[55] Again, an extraordinary drought, affecting the rivers and

[48] Act of God and the public enemy excuse common carriers. Desty's Ship. & Adm. (ed. 1879) sec. 250. See also secs. 70, 153, herein and chapter herein, on carriers.

[49] Wood v. Hubbard (U. S. C. C. A. 3d C.), 10 C. C. A. 623; 62 Fed. 753; vessel here was chartered in midwinter and delay was caused by being frozen in, and charterers might have chartered vessel before.

[50] Burrill v. Crossman (U. S. D. C. S. D. N. Y.), 65 Fed. 104.

[51] Burrill v. Crossman (U. S. C. C. A. 2d C.), 35 U. S. App. 608; 16 C. C. A. 381; 69 Fed. 747.

[52] 1,600 Tons of Nitrate of Soda v. McLeod (U. S. C. C. A. 9th C.), 61 Fed. 849. Examine, however, Smith v. Rosario Nitrate Co. (C. A.), [1894] 1 Q. B. 174, aff'g [1893] 2 Q. B. 323.

[53] Waterbury v. Street (U. S. C. C. A. 3d C.), 3 U. S. App. 147; 50 Fed. 835; 30 W. N. C. 269. See the Bohemia (U. S. D. C. S. D. N. Y.), 38 Fed. 756. But see Street v. The Progresso (U. S. D. C. E. D. Pa.), 42 Fed. 229.

[54] Bulman v. Fenwick (C. A.), [1894] 1 Q. B. 179.

[55] Castlegate S. S. Co. v. Dempsey (C. A.), [1892] 1 Q. B. 854, rev'g [1892] 1 Q. B. 454. See as to strikes generally, Empire Transp. Co. v. Philadelphia & R. C. & I. Co., 40 U. S. App. 157; 23 C. C. A. 564; 77 Fed. 919; Hick v. Rodocanachi, 65 L. T. Rep. N. S. 300; [1891] 2 Q. B. 626; 44 Alb. L. J. 462; Hick v. Raymond (H. L. E.), [1893] A. C. 22; The Alne Holme (Div. Ct.), [1893] P. 173; Southern P. R. Co. v. Johnson (Tex. App.), 15 S. W. 121; 45 Am. & Eng. R. Cas. 338; Gulf, C. & S. F. R. Co. v.

streams from which the cargo was to be obtained, will excuse the charterer from liability for demurrage where such time, lost by reason of the drought, is excluded in the time allowed under the charter.[56] And if owing to the condition of the weather, and consequent interruption of mining and railroad transportation, the charterers are not guilty of unreasonable delay under a charter for the carriage of coal, and they also exercise all reasonable diligence, they are not liable under an implied contract, where the charter is silent as to demurrage.[57] Although if no more time is lost by being frozen in, than would have been lost had the contemplated voyage been made, the expenses of detention will not be allowed, where the gross freight which would have been earned is recovered.[58] But generally the duty of the consignee to receive cargo and the ship's duty to remove and discharge the same are concurrent, so that if either is prevented performance by a major force, there is no default, unless that risk has been assumed by contract.[59]

§ 983. Demurrage—When allowed.—Ordinarily the stipulated demurrage will be allowed except the shipowner's loss is shown to be less.[60] Stipulated demurrage will also be allowed for a vessel's wrongful detention at the wharf, owing to her being there denied her proper precedence, and so, even though her

Gatewood, 79 Tex. 89; 14 S. W. 913; 10 L. R. A. 419. See also note 35 L. R. A. 623. But examine Budgett v. Binnington (C. A.), [1891] 1 Q. B. 35.

[56] Sorensen v. Keyser (U. S. D. C. S. D. Miss.), 48 Fed. 117. But see id. 2 U. S. App. 177; 51 Fed. 30; The India (U. S. C. C. A. 5th C.), 2 U. S. App. 83; 1 C. C. A. 174; 49 Fed. 76.

[57] Randall v. Sprague (U. S. D. C. Mass.), 67 Fed. 604. "*Bad weather*" construed. The Ocean Prince (U. S. D. C. D. N. Y.), 50 Fed. 115. Impending storm; stress of weather, The Ottawa, 33 Fed. 52.

[58] Wood v. Hubbard (U. S. C. C. A. 3d C.), 10 C. C. A. 623; 62 Fed. 753.

[59] Burrill v. Crossman (U. S. D. C. S. D. N. Y.), 65 Fed. 104. See as to act of God, restraint of rulers, bad weather, etc., exception and dispatch money, Prince Steam Shipping Co. v. Lehman (U. S. D. C. S. D. N. Y.), 20 Wash. L. Rep. 379. See as to *exception of causes beyond control* of shippers, consignees or charterers, preventing or delaying loading or discharging and liability for demurrage notwithstanding, Tyne Shipowning Co. v. Leech, 69 Law J. Q. B. 353, [1900]; 2 Q. B. 12; 48 Wkly. Rep. 590; 5 Com'l Cas. 155. Attachment of vessel is not within clause "restraint of princes." The Coventina (U. S. D. C. S. D. N. Y.), 52 Fed. 156.

[60] New York & N. E. R. Co. v. Church (U. S. C. C. A. 1st C.), 7 C. C. A. 384; 58 Fed. 600.

discharge was completed within the lay days allowed and she was not detained beyond the time when the consignee might hold her.[61] So demurrage will be allowed for delay caused by a dispute between the shipper and carrier, as to the position in which cargo shall be placed so as to be available to the consignee without extra work.[62] Liability for demurrage may also arise against the charterer for delay caused by a person, on whom he depended, erroneously designating the articles to be loaded.[63] So demurrage may be recovered for unreasonable detention in unloading a cargo of coal at the dock of a third person, to whom the owners of the vessel, under contract with the owners of the cargo, were to deliver the same "free of handling;" nor in such case is the clause for demurrage affected by the terms of the contract between the consignee and the cargo owners.[64] And if the delay in loading is due to detention on the railway, over which the cargo was transported to the loading berth, the charterer is liable for demurrage.[65]

§ 984. Same subject continued.—Where a vessel has begun to discharge at the place required, demurrage is chargeable for the time necessary to remove the vessel to the consignee's wharf, such removal being by their order.[66] Demurrage is also recoverable by the master, where he delays discharging in obedience to instructions from the charterer;[67] and so, where the master, being dissatisfied with the rate of discharge, gives notice that he shall claim demurrage for delay beyond a reasonable time and there is a delay after such notice.[68] Again, where the cargo is to be delivered free on board another vessel, to arrive, the risk of delay is assumed and demurrage may be charged therefor.[69] And consignees are liable for demurrage

[61] New York & N. E. R. Co. v. Church (U. S. C. C. A. 1st C.), 7 C. C. A. 384; 58 Fed. 600.

[62] Hudson River Lighterage Co. v. Wheeler Condenser & E. Co. (U. S. D. C. E. D. N. Y.), 93 Fed. 374.

[63] Creighton v. Dilks (U. S. D. C. E. D. Pa.), 49 Fed. 107.

[64] A Cargo of Hard Coal (U. S. C. C. A. 8th C.), 55 U. S. App. 181; 28 C. C. A. 466; 84 Fed. 495.

[65] Cushing v. McLeod, 2 N. B. Eq. 63.

[66] The James Baird (U. S. D. C. D. Mass.), 90 Fed. 669.

[67] Ten Thousand and Eighty-two Oak Ties (U. S. D. C. D. N. J.), 87 Fed. 935.

[68] Young v. 140,000 Hard Brick (U. S. D. C. S. D. N. Y.), 78 Fed. 149.

[69] Salisbury v. 70,000 Feet of Lum-

where the lack of dispatch, required by the charter party, arises from acts done for their own convenience or business purposes.[70] So the vessel is entitled to demurrage where the delay is occasioned by weighing the cargo in a manner contrary to the almost universal practice of the port;[71] or where the delays are contrary to contract, the vessel owners are responsible.[72] And demurrage will be allowed where delays arise from issuing attachments against the cargo;[73] or where there are too few men to complete the discharge the consignees are liable, where it is the duty of their men to take part in delivering and receiving.[74]

§ 985. Demurrage—When not allowed.—Delay caused by the master's absence from the vessel does not render the charterer liable for demurrage.[75] Nor will nominal damages in the nature of demurrage be allowed, where the allegations of the complaint set forth a stipulated sum per day to be paid under a charter party, to which defendant was not a party, and the proof shows no damage whatever.[76] So damages for delay in transportation will not be recoverable by the owners of the cargo of a vessel against another vessel, which receives salvage services from the former vessel.[77] And where the vessel fails to arrive in time, there being no guaranty that she would so arrive, and she is accepted and used thereafter upon her arrival, her owner is not chargeable with the difference between the agreed price under the charter party and that paid for the use of another vessel; especially so, where the reason for the delay is not apparent, the evidence as to the matter not being all before the court.[78] Again, a vessel must be ready to dis-

ber (U. S. D. C. S. D. N. Y.), 68 Fed. 916.

[70] Smith v. Roberts (U. S. C. C. A. 3d C.), 67 Fed. 361.

[71] Harrison v. Smith (U. S. C. C. A. 3d C.), 67 Fed. 354.

[72] Lumberman's Min. Co. v. Gilchrist (U. S. C. C. A. 6th C.), 55 Fed. 677.

[73] The Malta, 34 Fed. 144.

[74] Petersen v. Freebody (C. A.), [1895] 2 Q. B. 294.

[75] Whitman v. Vanderbilt (U. S. C. C. A. 2d C.), 38 U. S. App. 693; 75 Fed. 422.

[76] Dayton v. Parke, 142 N. Y. 391; 59 N. Y. St. R. 788; 37 N. E. 642, rev'g 67 Hun (N. Y.), 137; 57 N. Y. St. R. 542; 22 N. Y. Supp. 613.

[77] The Brixam (U. S. D. C. E. D. Va.), 54 Fed. 529.

[78] The Epliptika (U. S. D. C. E. D. Pa.), 95 Fed. 836.

charge according to stipulation, and if there is but one customary place therefor, and that is occupied when she arrives, she is not entitled to demurrage.[79] If a vessel is discharged by the dock company's servants, acting for both charterers and the vessel, as fast as possible under the circumstances, she is not entitled to demurrage, even though she might have discharged faster under other circumstances and the charter party provides for her discharge as fast as she can deliver.[80]

§ 986. Same subject continued.—If both parties were aware, when the contract was made, that at neap tides there was not enough water in the dock to load "always afloat," as required under the charter party, the charterer is not liable to the owner for delay in waiting for the spring tides before completing the loading.[81] So where the vessel, at the consignee's request, remains longer in port than stipulated for a return cargo, the shipper is not liable for demurrage as under an implied contract, the agreement being silent in that respect.[82] And where the obligation of providing a berth at the place of discharge is upon the shipowners, compliance with such condition is necessary to justify a claim for demurrage, and this charter party obligation may be implied, where it is expressly stipulated that the charterer provide a berth at the place of loading, it being silent as to the other condition.[83] If it does not appear who was in fault for failure to discharge kiln dried lumber on a rainy day, or that anyone requested such discharge, demurrage will not be allowed.[84] And the master will not be entitled to demurrage where the delay is caused by his own acts, or by failure to give notice of his intention to hold the cargo for such

[79] Sanders v. Jenkins [1897], 1 Q. B. 93; 66 L. J. Q. B. N. S. 40.

[80] The Jaederen [1892], P. 351. See as to clause, as fast as she can deliver, Hine v. Perkins (U. S. C. C. A. 2d C.), 55 Fed. 996.

[81] Carlton S. S. Co. v. Castle Mail P. Co. (H. L.), 78 Law. T. Rep. 661; [1898] A. C. 486; 67 L. J. Q. B. N. S. 795, aff'g 77 Law T. Rep. 332; [1897] 2 Q. B. 485; 66 L. J. Q. B. N. S. 819.

[82] Robertson v. Bethune, 3 Johns. (N. Y.) 342.

[83] Brett v. Harlan & H. Co., 83 Hun (N. Y.), 555; 65 N. Y. St. R. 8; 31 N. Y. Supp. 1113.

[84] The James Baird (U. S. D. C. D. Mass.), 90 Fed. 669.

claim.[85] Again, demurrage as such will not be allowed as damages, occasioned by a collision, where no actual loss is sustained by the injured vessel, other than certain expenses during repairs, such as board of passengers and cost of extra work.[86]

§ 987. Collision—Damages for detention of vessel—Repairs—Demurrage—When allowed.—Where a vessel is injured by collision, damages may be allowed for necessary detention during repairs,[87] justified by the injuries received.[88] So damages are recoverable for unnecessary delay caused by the collision;[89] or during the time of actual necessary detention;[90] or for the value of the use of the vessel pending repairs;[91] or during the time necessary for making the same;[92] or where the vessel might have been let during said time.[93] Again, rental value while undergoing repairs may be recovered.[94]

§ 988. Same subject continued.—Demurrage, or dam-

[85] Ten Thousand and Eighty-two Oak Ties (U. S. D. C. D. N. J.), 87 Fed. 935.

[86] The Saginaw (U. S. D. C. D. N. Y.), 95 Fed. 703, citing Williamson v. Barrett, 13 How. (U. S.) 101; 14 L. Ed. 68; The Conqueror, 166 U. S. 110; 41 L. Ed. 937; The Potomac, 105 U. S. 630; The Emerald (1896), P. 192; The Clarence, 3 W. Rob. Adm. 283.

[87] The Potomac, 105 U. S. 630; Williamson v. Barrett, 13 How. (U. S.) 101, vessel here was sunk; The Ernest A. Hamill, 100 Fed. 509; The Providence; Pearce & Old Colony S. Co. (U. S. C. C. A. Mass.), 38 C. C. A. 670; 98 Fed. 133; The Favorita, 18 Wall. (U. S.) 598; The Cayuga, 14 Wall. (U. S.) 270; Coffin v. The Osceola (U. S. D. C. N. Y.), 34 Fed. 921. See also The Baltimore, 8 Wall. (U. S.) 377; 19 L. Ed. 463; The Emma Kate Ross, 46 Fed. 872, modified 3 U. S. App. 171; 50 Fed. 845; 2 C. C. A. 55; The Margaret J. Sanford, 37 Fed. 148. See further Desty's Ship. & Adm. (ed. 1879) sec. 399.

[88] Wells v. Armstrong (U. S. D. C. N. Y.), 29 Fed. 216.

[89] The James H. Brewster (U. S. D. C. E. D. Pa.), 34 Fed. 77.

[90] The State of California (U. S. C. C. A. 9th C.), 54 Fed. 404.

[91] The Ohio (U. S. C. C. A. 6th C.), 62 U. S. App. 88; 33 C. C. A. 667; 91 Fed. 547; The Greta Holme (H. L.), 66 L. J. P. D. & A. N. S. 166; [1897] A. C. 596; 77 Law T. Rep. 231, rev'g (C. A.), [1896] P. 192; 74 Law T. Rep. 645; 65 L. J. P. D. & A. N. S. 69; The Mediana (C. A.), [1899] P. 127; 68 L. J. P. D. & A. N. S. 26; Whitehall T. Co. v. New Jersey Co., 51 N. Y. 369. See The Conqueror, 166 U. S. 110.

[92] H. M. Loud & Sons Lumber Co. v. Peter, 20 Ohio Cir. Ct. R. 73; 11 O. C. D. 155.

[93] The Greta Holme (H. L.), 66 L. J. P. D. & A. N. S. 166; [1897] A. C. 596; 77 Law T. Rep. 231, rev'g (C. A.), [1896] P. 192; 74 Law T. Rep. 645; 65 L. J. P. D. & A. N. S. 69.

[94] Mailler v. Express P. Line, 61 N. Y. 312.

ages for such detention or loss of use, etc., during repairs, are recoverable, even though the voyage might have been continued, but at an increase of risk;[95] and so, although the work might have been or was done by another vessel;[96] and so, notwithstanding there was no occasion, during such period of detention, for the use at any other point, of the vessel reserved to take the place of the injured boat;[97] and so, although direct pecuniary loss is not proven,[98] and substantial damages may be recovered for such detention;[99] or what the vessel would have earned during the season of navigation, for the period she was delayed for repairs, less the expense of earning the same;[100] or the actual loss sustained by the detention.[1]

§ 989. Same subject concluded. — The net value of the vessel's charter parties, and not the fair value of her use during the time, is the basis of computation of demurrage when such vessel is disabled by a collision and she is chartered for all but one day of the time she was so disabled, and other vessels belonging to the same owner took her place.[2] It is also determined that, in case of delay for repairs necessitated by collision, the measure of damages is the rate of demurrage in the charter party.[3] So the rate may be fixed by what the superin-

[95] Comerford v. The Melvina (U. S. D. C. Ill.), 43 Fed. 77.

[96] The Favorita, 18 Wall. (U. S.) 598; The Cayuga, 14 Wall. (U. S.) 270; The State of California (U. S. C. C. A. 9th C.), 54 Fed. 404. See The Providence, 98 Fed. 136; Coffin v. The Osceola (U. S. D. C. E. D. N. Y.), 34 Fed. 921; The Mediana (C. A.), [1899] P. 127; 68 L. J. P. D. & A. N. S. 26. But see The Wm. N. Hoag, 101 Fed. 846.

[97] The Mediana (C. A.), [1899] P. 127; 68 L. J. P. D. & A. N. S. 26.

[98] The Greta Holme (H. L.), 66 L. J. P. D. & A. N. S. 166; [1897] A. C. 596; 77 Law T. Rep. 231, rev'g (C. A.), [1896] P. 192; 74 Law T. Rep. 645; 65 L. J. P. D. & A. N. S. 69.

[99] The Mediana (C. A.), [1899] P. 127; 68 L. J. P. D. & A. N. S. 26; The Greta Holme (H. L.), 66 L. J. P. D. & A. N. S. 166; [1897] A. C. 596; 77 Law T. Rep. 231, rev'g (C. A.), [1896] P. 192; 74 Law T. Rep. 645; 65 L. J. P. D. & A. N. S. 69.

[100] The Bulgaria (U. S. D. C. N. D. N. Y.), 83 Fed. 312.

[1] The Armonia; The Redruth; Cory v. Penco (U. S. C. C. A. Pa.), 26 C. C. A. 338; 81 Fed. 227.

[2] The Emma Kate Ross (U. S. C. C. D. N. J.), 46 Fed. 872, modified 50 Fed. 845.

[3] The Silica v. The Lord Warden (U. S. C. C. E. D. Pa.), 30 Fed. 845. But see The James A. Dumont, 34 Fed. 428.

tendents of three principal ferries at the place gave it as their opinion, assigning reasons and showing estimates, that the service of the boat was worth; and this right to demurrage was also held not to be affected by the fact that no charter rate per day existed for ferryboats.[4] And if, at the time of collision, the ship was in no need of repair, and was engaged in and peculiarly fitted for a particular business, and her charter value cannot be otherwise satisfactorily ascertained, the average of the net profits of her trips for the season may be adopted as the measure of the allowance.[5] Again, it is decided that the amount of demurrage for a vessel disabled in collision, where she was kept not for hire but for use in the owner's business, is her worth to him and not what she could be let for in open market.[6]

§ 990. Collision—Damages for detention of vessel—Repairs—Demurrage—When not allowed.—Damages, in case of collision, will not be allowed because a vessel is kept out of market by reason of her injuries, where she had waited for a month prior to the collision for higher charters, and was held in a falling market above the market figures, while other equally valuable vessels had declined charters, and the injured vessel also remained in port after repairs were completed.[7] Nor will damages be allowed where the delay in making repairs is caused by want of skill;[8] nor where detention is occasioned by stress of weather after repairs are made;[9] nor in the absence of actual loss occasioned thereby, and reasonable proof of its amount; nor where a substituted vessel belonging to the same owners was doing, at the defendant's expense, the same work;[10] nor where the owners of a tug towing a lumber raft, which she wrecked, did not clearly understand that the schooner, which was to be loaded by said lumber, was on demurrage for which the lumber

[4] The Cayuga, 14 Wall. (U. S.) 270.

[5] The Potomac, 105 U. S. 630. The Providence; Pearce v. Old Colony S. Co. (U. S. C. C. A. Mass.), 38 C. C. A. 670; 98 Fed. 133. See The Bulgaria (U. S. D. C. N. Y.), 83 Fed. 312, aff'g 74 Fed. 898.

[6] Grubbs v. The John C. Fisher (U. S. D. C. W. D. Pa.), 22 Pitts. L. J. N. S. 122.

[7] The Glencairn (U. S. D. C. D. Or.), 78 Fed. 379.

[8] Comerford v. The Melvina (U. S. D. C. Ill.), 43 Fed. 77.

[9] John H. May (U. S. D. C. E. D. Pa.), 53 Fed. 664; Riggs v. The Orion and The Oakland, id.

[10] The City of Peking (P. C.), L. R. 15 App. Cas. 438.

owner would be liable;[11] nor where there is a total loss, as it is covered by restitution;[12] nor where the vessel while waiting her turn at the dry dock becomes locked by ice;[13] nor where the injured vessel was idle at the time of collision, and although repairs were incomplete, she went to work on obtaining a commission.[14]

§ 991. Damages—Illegal seizure, capture, detention, etc.—In case of a wrongful seizure and restoration, damages will be allowed for the detention and interest upon the value of the cargo, but not probable profits of the voyage either upon cargo or freight. If the vessel and cargo have been sold, the gross amount of the sales, with interest, is allowed, and under certain circumstances an additional per cent is recoverable.[15] So the prime cost of the value of the property lost, and in case of injury, the diminution in value by reason thereof with interest thereon, affords the measure of compensation.[16] Again, the value of the captured vessel and the prime cost of the cargo, with all charges, and the premium of insurance, where it has been paid, are recoverable as damages.[17] And the claimant's damages, for wrongful seizure under the customs laws, include demurrage, provided, however, that profits are actually lost, or may be reasonably supposed to have been lost and are provable with reasonable certainty. But the best evidence of damage suffered by detention is the sum for which vessels of the same size and class can be chartered in the market, although in the absence of such market value, the value of her use to the owner in the business in which she was engaged at the time is the proper basis for estimating damages for detention, and the books of her owner showing her

[11] The Henry Buck (U. S. D. C. D. S. C.), 39 Fed. 211.

[12] The Hamilton (U. S. D. C. N. Y.), 95 Fed. 844.

[13] The Mina A. Read (U. S. D. C. E. D. N. Y.), 30 Fed. 287.

[14] Charlton v. The Colorado, 3 Can. Exch. 263. See further as to non-allowance of demurrage. The State of California, 7 U. S. App. 652; 4 C. C. A. 393; 54 Fed. 404; La Champagne, 53 Fed. 398.

[15] The Appollon, 9 Wheat. (U. S.) 362.

[16] The Amiable Nancy, 3 Wheat. (U. S.) 546. See Williamson v. Barrett, 13 How. (U. S.) 101, 113; The Scotland, 105 U. S. 24, 36.

[17] The Anna Maria, 2 Wheat. (U. S.) 327. See The Umbria, 166 U. S. 404, 422; The Amiable Nancy, 3 Wheat. (U. S.) 546, 560.

earnings about such time are competent evidence of her probable earnings.[18] So the value of the cargo lost, and additional expense of detention, are recoverable where a vessel is illegally seized under an unconstitutional statute.[19] And in case of gross negligence or bad faith implying malice in arresting a vessel, actual damage need not be proven.[20] If there is an illegal capture, a bona fide purchaser without notice is entitled to be reimbursed the freight which he may have paid on the captured goods, and the innocent neutral carrier of such goods, the same having been transhipped in a foreign port, is entitled to freight out of the goods.[21] The United States may be liable for demurrage, in case of a prize and restitution, from the date when surrender for adjudication might have been made, until the date of surrender, at the rate fixed by the charter party.[22]

§ 992. Profits—When not allowable as damages.—In cases of marine torts the probable profits of a voyage, either upon the cargo or freight, do not constitute an element in computing the damages recoverable.[23] And the rule applies to probable or possible profits of an unfinished voyage, where there is a marine trespass,[24] or to probable profits at the port of destination in case of collision;[25] and loss of earnings or contingent damages are not included.[26] So in cases of total loss, estimated profits of a charter party, not yet entered upon, are always rejected, and this rule will be applied where the total loss arises from collision and there is nothing in the facts of the case to take it out of the rule.[27] So where the vessel is totally lost, by being

[18] The Conqueror, 166 U. S. 610; 41 L. Ed. 937; 17 Sup. Ct. 510. See further The Charming Betsey, 2 Cr. (U. S.) 64, as to nonintercourse law, seizure and report of assessors as to damages.

[19] Booth v. Lloyd (U. S. C. C. D. Md.), 33 Fed. 593.

[20] The Walter D. Wallet (1893), P. 202.

[21] The Fanny, 9 Wheat. (U. S.) 658.

[22] The Nuestra Senora de Regla, 108 U. S. 92.

[23] The Appollon, 9 Wheat. (U. S.) 362 (Seizure; French Tonnage duty Act of 1820); La Amistad de Rues, 5 Wheat. (U. S.) 385; Hunt v. Hoboken L. Imp. Co., 3 E. D. Smith, 144. See secs. 996–998 herein, as to charter party.

[24] The Amiable Nancy, 3 Wheat. (U. S.) 546 (illegal seizure).

[25] Smith v. Condry, 1 How. (U. S.) 28.

[26] Finch v. Brown, 13 Wend. (N. Y.) 601.

[27] The Umbria, 166 U. S. 104. Interest and net pending freight also included. Id. A claim of owners to recover the value of an unexpired

sunk in a collision, and her full value is awarded the owners, no recovery can be had for the loss of profits for the unexpired term of her charter.[28] So the rule precludes recovery of loss of profits under a dredging contract occasioned by collision and the loss of a dredge, where the work was actually continued by other vessels, and the dredge, which was not shattered, was in use.[29] Again, in case of a collision and loss of cargo at sea, there should be no allowance for anticipated profits, and if the goods have no market value at the place of shipment, the price which they usually bring at the port of destination should be allowed, with a fair deduction for profits and charges.[30]

§ 993. Profits—When allowed as damages.—Evidence of the profits that the vessel would have earned if not disabled is admissible where there is no market price; but the amount that would in ordinary cases be disbursed in earning it must be deducted from the gross freight, for no more than the net profits can be recovered as damages.[31] And where a vessel is regarded as a total loss, occasioned by a collision, but she is subsequently raised and repaired, net profits of the pending voyage may be included in the amount allowed as damages.[32] So profits which

term of a season charter, in addition to the full value of a lost vessel and her freight pending, may properly be rejected. "The general rule is that where the loss is total, the estimated profits of a charter, not yet entered upon, are always rejected. Where the loss is partial, the damages, for very apparent reasons, include all loss due to detention for repairs, which may include the loss of a charter not yet entered upon. In such case, the question is as to the value of the use of the vessel while undergoing repairs. The distinction is elaborated, and the authorities cited in the case of The Umbria, 166 U. S. 404, 421; 17 Sup. Ct. 610; 41 L. Ed. 1053, which case was followed by this court in the case of Mason v. Ins. Co." (110 Fed. 452); The George W. Roby (U. S. C. C. A. 6th C. E. D. Mich.), 111 Fed. 601, 617, per Lurton, C. J.

[28] In re Lakeland Tr. Co., 103 Fed. 328.

[29] The City of Alexandria (U. S. D. C. S. D. N. Y.), 40 Fed. 697. "As a general rule, subject to well-established qualifications, anticipated profits prevented by breach of a contract are not recoverable as damages for such breach." Howard v. Stillwell & Bierce Mfg. Co., 139 U. S. 199, 206, and citations of this case in Russell & Winslow's Syl. Dig. U. S. Sup. Ct. Rep. p. 1887.

[30] The Scotland, 14 Wall. (U. S.) 170.

[31] The Potomac, 105 U. S. 630, 632.

[32] The Ohio (U. S. C. C. A. 6th C.), 62 U. S. App. 88; 33 C. C. A. 667, 91 Fed. 547.

would have accrued had the chartered voyage been completed by the injured vessel will be recoverable.[33] But, in case of wrongful seizure under the customs laws, the profits must have been actually lost or be reasonably supposed to have been lost in order to be recoverable as damages.[34] Where profits are claimed, however, the libellant must prove the extent of the damages actually sustained by him.[35]

§ 994. Freight.—Net pending freight is recoverable for injury or loss of a vessel in collision;[36] and if the voyage is prevented from being performed by another's wrongful act, as in case of a collision, the freight which would have been earned, less the cost of earning it, is recoverable;[37] that is, the freight which would have been earned on that voyage may be recovered, but not freight for a subsequent voyage although engaged.[38] So agreed freight, less costs, expenses and charges for the remainder of the voyage may be recovered, where there is a total loss before freight fully earned.[39] Again, freight pending is freight earned, and freight is not earned until the goods are carried to and delivered to the place of destination, and freight paid in advance may, in the absence of a special agreement to the contrary, be recovered back if the voyage be broken up and

[33] The Kate, 68 L. J. Prob. 41; (1899) P. 165; 80 L. T. N. S. 423; 47 Week. Rep. 669; 8 Asp. 539. The exception to the general rule as to nonallowance of profits is thus stated: "But where such profits, which would have been prevented by its" (the contract's) "breach, are not open to the objection of uncertainty or remoteness, or where from the express or implied terms of the contract itself, or the special circumstances under which it was made, it may be reasonably presumed that they were within the intent and mutual understanding of both parties at the time it was entered into, they are so recoverable." Howard v. Stillwell & B. Mfg. Co., 139 U. S. 199, 206.

[34] The Conqueror, 166 U. S. 110.

[35] The Potomac, 105 U. S. 630, 632. See further as to profits secs. 996–998 herein, as to charter party.

[36] The Rabboni (U. S. C. C. D. Me.), 53 Fed. 952, aff'g 53 Fed. 948. See The Umbria, 166 U. S. 404; 41 L. Ed. 1053; 17 Sup. Ct. 610.

[37] Dalbeattie S. Co. v. Caid (U. S. D. C. E. D. S. C.), 59 Fed. 159; La Champagne (U. S. D. C. S. D. N. Y.), 53 Fed. 398.

[38] Fabre v. Cunard S. S. Co. (U. S. C. C. A. N. Y.), 3 C. C. A. 534; 53 Fed. 288, rev'g 40 Fed. 893; 46 Fed. 301. See The Umbria, 166 U. S. 404; 17 Sup. Ct. 610; 41 L. Ed. 1053.

[39] The Golden Grove (U. S. D. C. Del.), 13 Fed. 674.

the goods be not carried for any cause not imputable to the shipper.[40] Although freight earned is an element of value, and full freight is frequently recoverable, yet two thirds the full freight was the rule of compensation in the French spoliation cases.[41]

§ 995. Same subject continued.—In case of the breach of a charter party, the shipowner may become entitled to the whole of the stipulated freight.[42] Although if cargo has actually been engaged for a vessel under charter, and she is prevented by a collision from making the voyage, such facts do not entitle her to recover as damages the net freight which she would earn on such a voyage.[43] If a vessel totally lost is loaded entirely with the vessel owner's goods, there can be no recovery for freight, even though the loss was occasioned by the colliding vessel.[44] But where some portion of a perishable cargo has suffered by decay, without the fault of the master, and was for that reason left behind on the voyage, the shipowners are entitled to recover for the freight on all that was duly transported and delivered.[45] And where there is a failure to furnish a cargo under a charter party, the amount of the freight, less freight earned during the term, is the measure of damages.[46] So freight earned, or damages for a breach of the charter party, but not both, may be recovered, where the charterer makes a departure for a port other than that in the charter party, and the shipowner takes

[40] Pacific Coast v. Reynolds (U. S. C. C. A. 9th C. N. D. Cal.), 114 Fed. 877, citing Carv. Carr. by Sea (2d ed.), sec. 547; The City of Norwich, 118 U. S. 468; 6 Sup. Ct. 1150; 30 L. Ed. 134; The Scotland, 105 U. S. 24; 26 L. Ed. 1001; The Main v. Williams, 152 U. S. 122; 14 Sup. Ct. 486; 38 L. E. 381; The Abbie C. Stubbs, 28 Fed. 719; In re Meyer, 74 Fed. 781; In re Liverpool & G. W. S. Co., 3 Fed. 168; Brown v. Harris, 2 Gray, 359. See also Watson v. Duykinck, 3 Johns. (N. Y.) 335; Beatson v. Elwell, 49 N. Y. 678; 3 Alb. L. J. 277; Emery v. Dunbar, 1 Daly (N. Y.), 408; Kinsman v. N. Y. Mut. Ins. Co., 5 Bos. (N. Y.) 460.

[41] Hooper v. U. S., 22 Ct. Cl. 408.

[42] The Gazelle, 128 U. S. 474. See Christie v. Davis C. & C. Co. (U. S. D. C. S. D. N. Y.), 95 Fed. 837.

[43] Fabre v. Cunard S. S. Co. (U. S. C. C. App. 2d C.), 1 U. S. App. 614; 3 C. C. A. 534; 53 Fed. 288.

[44] The Beatrice Havener (U. S. D. C. E. D. N. Y.), 50 Fed. 232.

[45] The Collenberg, 1 Bl. (U. S.) 170.

[46] Stone v. Woodruff, 28 Hun (N. Y.), 534.

in cargo for such intermediate port, the charterer being entitled to the ship's full lading capacity.[47]

§ 996. Breach of charter party—Charterers—Generally.—The damages recoverable for breach of charter party must be confined to those which naturally and directly result from said breach, or which may fairly be presumed to have been within the contemplation of the parties when the contract was made.[48] So the actual damage suffered for the violation of a charter party is the measure of recovery, in the absence of a different rule under the law of the place of contract, and the determination of the amount rests upon the rules of admiralty and commercial law.[49] Again, the measure of damages has also been decided to be the stipulated price, less net earnings, during the time the vessel would have occupied in the charter voyage, including lay days.[50] If there is a failure to deliver the vessel at the stipulated time, recovery may be had for the difference between the charter hire and the reasonable cost of procuring a like vessel as that called for by the charter; and the obligation rests upon the charterer to procure, if he can do so, by reasonable diligence and at a reasonable hire, another like vessel in order to reduce damages.[51] And in case of a refusal to accept the vessel and load her, the damages will be the difference between the specified charter party rate and the rate of charter for the vessel on the day of refusal,[52] and where the ship is subsequently offered to be taken at a lower rate, the difference between the two rates has been allowed.[53] In a decision in the United States supreme court, under a charter party, which allowed fifteen lay days for loading after the ship was ready to receive the cargo, the owner tendered her to the charterers, they immediately re-

[47] The Port Adelaide (U. S. D. C. E. D. N. Y.), 59 Fed. 174. See further cases under secs. 996–998 herein, breach of charter party, chapter *post*, herein, on insurance. Joyce on Ins. (ed. 1897) secs. 1606, 1619, 2781, 3015, 3444, 3452, 3455; Desty's Ship. & Adm. (ed. 1879) secs. 274–289.

[48] The George Dumois (U. S. C. C. A. 2d C. E. D. N. Y.), 115 Fed. 6.

[49] Watts v. Camors (U. S. C. C. La.), 10 Fed. 145, aff'd 115 U. S. 353; 29 L. Ed. 406; 6 S. Ct. 91.

[50] Ashburner v. Balchen, 7 N. Y. 262.

[51] Munson v. Sanders (U. S. C. C. A. 2d C.), 45 U. S. App. 32; 20 C. C. A. 581; 74 Fed. 649.

[52] Galgate Ship Co. v. Starr (U. S. D. C. N. D. Cal.), 58 Fed. 894.

[53] Greenwell v. Ross (U. S. C. C. La.), 34 Fed. 656.

fused to accept her, and thirty-six days afterwards he obtained another cargo, but negotiations were pending between the parties for half of that time, and the owner sustained substantial damage in a certain amount by the failure of the charterers to comply with their contract. The circuit court found these facts and entered a decree against the charterers for that amount, and the supreme court determined that no error in law existed for which the charterers could have the decree reversed.[54]

§ 997. Same subject continued.—If the charterer wrongfully refuses to load, only actual damages sustained can be recovered; but where another cargo is obtained with very little delay and at a less rate, the difference between the net result of carrying out the charter and the net freight actually earned determines the compensation.[55] Again, where the breach is in a refusal to furnish cargo, the difference of freight between the cargo obtained and that contracted for, less the freight refused because of space necessitated for fuel for a longer voyage required, is decided to be the measure of damages; there will not, however, be included demurrage and expenses of fixing defendant's liability.[56] And if nothing is shown to excuse performance by the charterers of their express undertaking to furnish a full cargo, the libellant is entitled to compensation from them, by way of dead freight, upon the difference between what would have been a complete cargo and the partial one which was actually put on board.[57] So where there is a failure to furnish the requisite amount, or what constitutes a fair allowance, of cargo, a recovery may, it is held, be had for what would be made by carrying an amount equal to the deficiency.[58] So the difference between a lower rate offered to load the ship and the charter rate will govern the admeasurement of damages.[59] And if, in case of negligent delay, there is a fall in

[54] Watts v. Camors, 115 U. S. 353; 29 L. Ed. 406; 6 S. Ct. 91, aff'g Camors v. Watts (U. S. C. C. La.), 10 Fed. 145.

[55] Dalbeattee S. S. Co. v. Caid (U. S. D. C. E. D. S. D.), 59 Fed. 159.

[56] Greenwell v. Ross (U. S. C. C. E. D. La.), 34 Fed. 656.

[57] Carbon Slate Co. v. Ennis; Bacon v. Same (U. S. C. C. A. 3d C. E. D. Pa.), 114 Fed. 260.

[58] Parker v. Tiers (U. S. D. C. E. D. Pa.), 29 Fed. 800.

[59] Greenwell v. Ross (U. S. C. C. E. D. La.), 34 Fed. 658. See generally Desty's Ship. & Adm. (ed. 1879) sec. 216.

market prices, and the delay is within the chartered voyage, the amount thereof is recoverable.[60] Again, if there is a refusal to receive goods as stipulated, the difference in the market price of transportation is the measure of damages. If there be no market price, then the actual cost of transportation, and the necessary expense of keeping or preserving the cargo until transportation can be had, depreciation and the difference in market value during the delay will be allowed.[61] So where, in consequence of a breach of a charter party, the transportation of cargoes, which the chartered vessel ought to have carried, by other vessels, is necessitated, the difference between the freight paid therefor and the freight fixed in the charter party is the measure of damages.[62]

§ 998. Same subject concluded.—Where there is an advance in freight after execution of the charter party, and there is a breach, the difference is a factor, and commissions stipulated for are also an element.[63] So net freight for the unexpired term of a charter for a definite time is recoverable against the vessel in fault.[64] So goods may be forwarded to the destination by other means of transportation, and freight earned by the owner of a chartered ship, which has been disabled by excepted perils, provided he transhipps within a reasonable time, or repairs with reasonable dispatch.[65] Again, the difference between the freight stipulated and the freight paid is recoverable as damages for breach of a charter party to make as many trips as possible, where other vessels are required to be chartered for carrying cargoes, necessitated by the loss of a trip occasioned by the owner's fault.[66] And where freight is earned by carrying for others during part of the voyage, it may be recovered by the

[60] The Giulio (U. S. D. C. N. Y.), 34 Fed. 909.

[61] The Rossend Castle (U. S. D. C. N. Y.), 50 Fed. 462.

[62] Lumberman's M. Co. v. Gilchrist (U. S. C. C. A. Ohio), 5 C. C. A. 239; 55 Fed. 677; The B. F. Bruce, 50 Fed. 118.

[63] The Augustine Kobbe (U. S. D. C. Ala.), 37 Fed. 696.

[64] The Freddie L. Porter (U. S. C. C. Me.), 8 Fed. 170; The Hope and Freddie L. Porter, 5 Fed. 822. But see The North Star (U. S. D. C. Mich.), 44 Fed. 492.

[65] Owen v. Outerbridge, 26 Can. S. C. 272. See Joyce on Ins. (ed. 1897) secs. 1606, 1617, 1619, 2781, 2836, 3015, 3099, 3452, 3454, 3455.

[66] The Oregon v. Pittsburg & L. A. I. Co. (U. S. C. C. A. Ohio), 55 Fed. 666.

charterer, less the expense of earning it, where he has chartered the vessel's entire carrying capacity for a particular voyage, and also the services of the officers and crew.[67] So net profits of a vessel, chartered for a definite time and which is totally lost during her employment, may be recovered for the whole period of her agreement.[68] And the market value of the charter for the unexpired term of a steamboat, chartered for excursion purposes, is the measure of compensation without any allowance for unearned or speculative profits.[69] So the profits lost under a charter party, which the vessel was on her way to perform, when she is lost by collision, constitutes her value,[70] although it is held, that the value of a vessel under a charter party is that at the date of the completion of the voyage.[71]

§ 999. Charter party—Liquidated damages—Penalty.—The clause in a charter party by which the parties mutually bind themselves, the ship and freight, and the merchandise to be laden on board "in the penal sum of estimated amount of freight" to the performance of all and every of their agreements, is not a stipulation for liquidated damages, but a penalty to secure the payment of the amount of damage that either party may actually suffer from any breach of the contract; and is to be so treated in a court of admiralty of the United States, whatever may be the rule in the courts of the particular state in which the contract is made and the court of admiralty sits.[72]

§ 1000. Vessels as carriers of passengers—Damages.[73]—

[67] The Port Adelaide; Jamison v. Perry (U. S. C. C. A. N. Y.), 10 C. C. A. 505; 62 Fed. 486, modifying 59 Fed. 174.

[68] The Hope and Freddie L. Porter (U. S. D. C. Me.), 5 Fed. 822.

[69] Mitchell v. Connell, 12 J. & S. (N. Y.) 401.

[70] The Kate (1899), P. D. 165; 68 L. J. P. D. & A. N. S. 41; The Hamilton (U. S. D. C. E. D. N. Y.), 95 Fed. 844, citing The Amiable Nancy, 3 Wheat. (U. S.) 546; 4 L. Ed. 456; The Umbria, 166 U. S. 423; 41 L. Ed. 1063.

[71] The Kate (1899), P. D. 165; 80 L. T. N. S. 423; 8 Asp. 539; 47 Week. Rep. 669.

[72] Watts v. Camors, 115 U. S. 353; 29 L. Ed. 406, aff'g Camors v. Watts, 10 Fed. 145. See Bignall v. Gould, 119 U. S. 495, 498. As to penalty for violation of statute to compel steam vessels to carry fire screens, see Barrows v. Delta Trans. Co., 106 Mich. 582; 64 N. W. 501; 2 Det. L. N. 503; 29 L. R. A. 468.

[73] See chapters *ante* herein, on carriers and on personal injuries.

Generally, a contract for the transportation of passengers on the ocean, by a steamship, is a maritime contract, and there is no distinction in principle between it and a contract for like transportation of merchandise. The same liability attaches upon its execution both to the owner and the steamship.[74] And where there is a deviation to carry cargo, it constitutes a breach of contract for a direct passage, where the passenger had no notice of intent to take such cargo, and where a delay of several days is caused by such deviation in order to discharge said cargo, and no special damage is proved; there may, therefore, in such case be a recovery for the amount of passage money paid.[75] Again, it is held that if a passenger has been induced, by false representations, that no steerage passengers would be carried, to purchase and take passage on a steamer which is quarantined because of an outbreak of cholera on board, he may recover the actual damages thereby occasioned to him.[76] And it is decided that although a ship is seaworthy, yet if she apparently requires a survey and the surveyors state that her condition is such that they cannot recommend her as a passenger vessel, a passenger who has paid his fare for the voyage and gone aboard ship may abandon said voyage and recover damages for a breach of his contract.[77] So a steamship, which fails to land passengers within a reasonable length of time after reaching their destination, may become liable for reasonable compensation for personal discomfort, extra expenses, losses of baggage and freight, and consequential losses on account of delay in delivering their baggage and freight; and due allowance will be made for exaggerations of evidence, for contributory negligence and for unnecessary expenses in defending the ship on account of claims for

[74] The Moses Taylor, 4 Wall. (U. S.) 411. See The New World Steamboat v. King, 16 How. (U. S.) 469, as to degree of care required, admiralty jurisdiction, injuries to passengers and free passage.

[75] De Colange v. The Chateau Margaux (U. S. D. C. N. Y.), 37 Fed. 157.

[76] The Normannia (U. S. D. C. N. Y.), 62 Fed. 469; Beers v. Hamburg-American Packet Co., id.

[77] The Guardian (U. S. D. C. D. Wash.), 89 Fed. 998. Although a vessel is staunch and seaworthy, yet if before sailing her appearance and reports in the press justifies a passenger's belief that she is rotten and unsafe, he is entitled to recover back his passage money. Id. See The Longfellow (U. S. C. C. A. Ohio), 45 C. C. A. 379; 104 Fed. 360, as to Rev. Stat. sec. 4417, as to inspection.

excessive damages.[78] It is also decided that the measure of damages for failure to land passengers at their destination and to afford them an opportunity to reach a distant point is the actual injury sustained, including a reasonable sum for the loss of time necessarily occasioned, the amount of fare paid and the cost of a return ticket to the port of departure where the passenger returns thereto.[79] But an injury to health consequent upon voluntary exposure after collision is not an item of damages occasioned by such collision.[80] Nor are damages recoverable because food furnished on a sea voyage is not as good as might have been furnished or provided on short voyage vessels, especially where the passengers do not really suffer.[81]

§ 1001. Vessel as carrier of passengers—Refusal of passage and transfer to another ship—Damages.—Although a common carrier of passengers by sea, as a master of a steamship, may properly refuse a passage to a person who has been forcibly expelled by the actual, though violent and revolutionary authorities of a town, under threat of death if he return, and when the bringing back and landing of such passenger would in the opinion of such master tend to promote further difficulty, yet this refusal should precede the sailing of the ship. If the passenger has violated no inflexible rule of the ship in getting aboard the vessel, has himself or through a friend paid or tendered the passage money, and has conducted himself properly during the voyage, the master has no legal right to stop a returning vessel and put him aboard it, and send him back to the port of departure. And if he does so the damages will be awarded against him in admiralty, but if the captain does not act with any malice and so transfers the passenger with the humane motive of saving his life from forfeiture, as he believes, at the port of destination of his vessel, the damages will be mitigated by such motive and the award will be small. Nor is the passenger entitled to recover damages for injuries suffered

[78] Pacific Steam Whaling Co. v. Grismore (U. S. C. C. A. 9th C. N. D. D. Wash.), 117 Fed. 68.

[79] The President (U. S. D. C. Cal.), 92 Fed. 673.

[80] Ulrich v. The Brinton and The Wilkesbarre (U. S. D. C. N. Y.), 50 Fed. 581.

[81] The President (U. S. D. C. Cal.), 92 Fed. 673. See The D. C. Murray (U. S. D. C. Cal.), 89 Fed. 508.

afterwards from obstructions in getting to the place from which he had been expelled.[82]

§ 1002. Vessels—Carriage of passengers—Limitation of liability by contract.—The privilege of contracting for a limitation of liability, for the carriage of passengers is allowable only within such limits as are just and reasonable and consistent with the sound policy of the law.[83] And it is decided that a shipowner may limit his liability for loss of a passenger's effects.[84] But it is determined that a limitation of the common-law liability for perils at sea is not binding, where the passenger ticket, on the back of which it is printed, merely refers thereto by the words, "see back."[85]

§ 1003. Vessels as carriers of freight.—While certain principles of commercial and admiralty law apply to carriage of goods by sea,[86] yet there are general rules which govern the recovery of damages against such carriers and also other carriers of freight, so that, outside of such consideration as is given in this chapter to charter parties, the decisions relating to carriers of freight by sea have been discussed under the chapter herein relating to carriers.

§ 1004. Destruction, loss or detention of yacht or pilot boat—Damages.—The measure of damages for the destruction of an expensive, steam pleasure yacht is decided to be the value to her owner for the purposes for which she is employed, her market value being dependent upon these factors, and also the difficulty of obtaining a yacht in a reasonable time.[87] It is also

[82] Pearson v. Duane, 4 Wall. (U. S.) 605. That vessel is obligated to carry passengers, see Desty's Ship. & Adm. (ed. 1879) sec. 267.

[83] Pacific Steam Whaling Co. v. Grismore (U. S. C. C. A. 9th C. N. D. D. Wash.), 117 Fed. 68, citing Michigan C. R. Co. v. Mineral Springs Mfg. Co., 16 Wall. (U. S.) 324; 21 L. Ed. 297; The President (U. S. D. C. Cal.), 92 Fed. 673, 675.

[84] The Stella, 71 Law T. N. S. 235; 8 Asp. 605.

[85] Potter v. The Majestic (U. S. C. C. A. N. Y.), 9 C. C. A. 161; 60 Fed. 164.

[86] See Watts v. Camors (U. S. C. C. La.), 10 Fed. 145, case aff'd 115 U. S. 353; 29 L. Ed. 406; 6 S. Ct. 91.

[87] The H. F. Dimock (U. S. C. C. A. 1st C.), 33 U. S. App. 647; 23 C. C. A. 123; 77 Fed. 226. See The Gazelle, 33 Fed. 301.

held that for delay for repairs necessitated by collision, a yacht owner is entitled to recover the sum for which a yacht could actually have been chartered for hire, even though she was not used for profit; nor in such case are damages limited to interest on the cost of the yacht.[88] Again, a yacht owner who sinks another yacht, owing to a breach by him of the rules which he has agreed to observe on entering a race, must compensate the owner of the sunken yacht to her full value.[89] And where a yacht designed only for pleasure is wrongfully seized, under the customs laws a reasonable certainty of pecuniary loss must be shown, and demurrage is a proper element of damages.[90] It is difficult, however, to ascertain the market value of a pilot boat for they are seldom sold or change hands, and in a certain sense have no market value, but in determining their value in case of collision and being totally lost, the boat's condition, age, equipment and adaptability for her service at the time of loss are factors.[91]

§ 1005. Defenses—Deductions—Duty to lessen loss—Generally.—It cannot operate to reduce the damages that plaintiff had received part of the loss from insurers.[92] Nor can changes in foreign value be considered in case of a foreign cargo; nor can unpaid duties be deducted from the amount recoverable;[93] nor should damages for collision and from surplus liens thereafter created and wharfage dues thereafter be distributed until state law liens have been satisfied.[94] And deductions should be made from the amount awarded for a total loss of one half the amount payable for the loss by death of passengers occasioned by the collision.[95] And evidence is admissible in mitigation of damages in an action on a charter party, of fraudulent repre-

[88] The Lagonda (U. S. D. C. E. D. N. Y.), 44 Fed. 367. See The Walter W. Pharo, 1 Low (U. S. D. C.), 437.

[89] The Satanita (H. L.), [1897] A. C. 59; 66 L. J. P. D. & A. N. S. 1; 75 Law T. Rep. 337.

[90] The Conqueror, 166 U. S. 110; 41 L. Ed. 937; 17 Sup. Ct. 510. See The Lagonda, 44 Fed. 367.

[91] The Normandie (U. S. C. C. A. 2d C.), 7 C. C. A. 285; 58 Fed. 427. See The Transit, 4 Ben. 138.

[92] Carpenter v. Eastern T. Co., 67 Barb. (N. Y.) 570.

[93] The Surrey (U. S. D. C. S. D. N. Y.), 30 Fed. 223.

[94] The Glen Iris (U. S. D. C. E. D. N. Y.), 78 Fed. 511.

[95] The Albert Dumois, 177 U. S. 240; 20 Sup. Ct. 595; 44 L. Ed. 751, aff'g Jakobsen v. Springer, 31 C. C. A. 315; 87 Fed. 948.

sentations.[96] A deduction from the plaintiff's demand in an action for advancements cannot be allowed for the amount of loss resulting from the breaking up of an intended voyage.[97] Again, a failure to endeavor to raise a vessel will not lessen the amount recoverable for negligently sinking her where such efforts would have been unavailing.[98] Nor, where there is a refusal of what would probably have been effective services offered by the tug which occasioned the injury, or by others belonging to the same owners, can the cost of floating a schooner and subsequent damages to the vessel and cargo be recovered.[99]

§ 1006. Stipulations—Stipulators—Release—Generally.—In case of collision the stipulated value of the vessel grossly in fault may be applied to the loss of cargo, and the vessel not being entirely free from fault will be required to make up the deficiency.[100] So the value of the offending vessel may be fixed by stipulators to procure her discharge at that identical sum.[1] And stipulators may be obligated for a balance of the moiety decreed to the extent of the vessel's stipulated value beyond the moiety due from her.[2] But the decree should not exceed the sum for which sureties are bound on stipulations for a discharge of the offending vessel.[3] Although within that amount damages may be given though exceeding those claimed by the libel originally, and while it was uncertain what the damages would be, provided the libel has been properly amended.[4] And if there is a release of all damages except the loss of use, gross earnings, less the expense of making them, is the amount recoverable.[5]

[96] Johnson v. Miller, 14 Wend. (N. Y.) 195.

[97] Willinks v. Hollingsworth, 6 Wheat. (U. S.) 240.

[98] Boston Towboat Co. v. Pettie (U. S. C. C. A. 2d C.), 1 U. S. App. 51; 49 Fed. 464.

[99] The Bronx (U. S. D. C. D. Mass.), 86 Fed. 808.

[100] The Victory (U. S. C. C. A. 4th C.), 68 Fed. 395, modifying 63 Fed. 631.

[1] The Ann Caroline, 2 Wall. (U. S.) 539.

[2] The "Virginia Ehrman" and The "Agnese," 97 U. S. 309.

[3] The Steamer Webb, 14 Wall. (U. S.) 406; The Hypodame, 6 Wall. (U. S.) 216.

[4] The Hypodame, 6 Wall. (U. S.) 216.

[5] The Cayuga (U. S. C. C. A. 6th C.), 8 C. C. A. 188; 59 Fed. 483. See The Cayuga, 14 Wall. (U. S.) 270.

§ 1007. Interest, costs and counsel fees—Damages.—Interest and costs will be allowed to an innocent party in case of collision at sea, both vessels being in fault.[6] And in case of a total loss by collision, interest on the value of the vessel is included in the damages.[7] So in cases of detention, consequent upon collision, interest may be allowed as damages.[8] And interest will be allowed on liquidated damages, as where specific amounts are actually paid for repairs, etc., in cases of collision.[9] Again, in case of collision and a limited liability bond given, where the loss of one vessel with interest to the date of the decree exceeded the loss of the other vessel with like interest, by a sum, one half of which was greater than the amount of such bond, with interest from the date of the decree of the district court to the date of the decree of the circuit court, the damages were awarded to the amount of such bond with such interest.[10] But the allowance of interest by way of damages, in cases of collision and other cases of pure damage, as well as the allowance of costs, is in the discretion of the court.[11] So the court

[6] The Alabama and The Game Cock, 92 U. S. (1875) 695.

[7] The Umbria, 166 U. S. (1896) 404; 41 L. Ed. 1053; 17 Sup. Ct. 610.

[8] The Natchez (U. S. C. C. A. 5th C.), 41 U. S. App. 708; 24 C. C. A. 49; 78 Fed. 183; Mailler v. Express P. Line, 61 N. Y. 312; Whitehall T. Co. v. New Jersey Co., 51 N. Y. 369. When interest and not demurrage should be allowed, see La Champagne (U. S. D. C. S. D. N. Y.), 53 Fed. 398.

[9] The Natchez (U. S. C. C. A. 5th C.), 41 U. S. App. 708; 24 C. C. A. 49; 78 Fed. 183.

[10] The Manitoba, 122 U. S. (1886) 97. See The Chattahoochee, 173 U. S. 540, 549; 43 L. Ed. 801; 19 Sup Ct. R. 491.

[11] The Scotland, 118 U. S. (1885) 507; The Albert Dumois, 177 U. S. 240; 20 Sup. Ct. 595; 44 L. Ed. 751, aff'g Jacobsen v. Springer, 31 C. C. A. 315; 87 Fed. 948. See The Albert Dumois, 177 U. S. 255. In collisions, whether interest shall be allowed by the court of first instance or by the appellate court, in admiralty rests in the court's discretion. The North Star (U. S. C. C. A. 6th C.), 62 Fed. 71. Costs in admiralty are wholly under control of the court giving them. The Sapphire, 18 Wall. (U. S. 1873) 51. Six per cent allowed as interest regardless of legal rate in state where collision occurred. The Oregon (U. S. D. C. D. Or.), 89 Fed. 520. Interest allowed on value destroyed by collision, where payment withheld. The Illinois (U. S. D. C. E. D. Pa.), 84 Fed. 697, aff'd 87 Fed. 574. That interest allowed upon damages occasioned by collision, see The Bulgaria (U. S. D. C. N. D. N. Y.), 83 Fed. 312. See further The North Star, 22 U. S. App. 242; 10 C. C. A. 262; 62 Fed. 71; note 18 L. R. A. 453. Interest on the amount of the damages from the time of the

may or may not, in its discretion, allow interest on the proceeds of a wreck or strippings therefrom.[12] Again, the prevailing party in an admiralty case is entitled to recover, as part of the taxable costs, the amount of actual expenditures for a surety company bond, when necessary to release a vessel from custody. But the benefit or advantage to the parties in having a vessel speedily released from custody is not, of itself, a sufficient basis for allowing premiums paid for surety companies' bonds to be taxed as costs, although it is worthy of consideration. The costs which are taxable and recoverable by the prevailing party in a cause are prescribed by statute, but in addition thereto the courts allow the prevailing party to recover the amount of actual disbursements which are necessary or reasonable to be incurred in the preparation or conduct of a cause. But only statutory costs and actual disbursements can be recovered.[13]

§ 1008. Same subject continued.—Interest and costs may be recovered by several libellants against each of two offending vessels in a collision.[14] Again, costs and expenses are not matters positively limited by law, but are allowed in the exercise of a sound discretion of the court, and no appeal lies from a mere decree respecting costs and expenses,[15] although costs may be apportioned where both vessels are in fault for the collision.[16] And stipulators, who have been guilty of default or contumacy, may be held for costs and interest in the nature of damages to the extent that the same have arisen from a breach

injury allowed. Fitch v. Livingston, 4 Sand. (N. Y.) 492. As to apportionment of costs between appellants, see The C. P. Raymond, 36 Fed. 336. Interest not calculated upon judgment affirmed by divided court; 18th rule of court never applied to admiralty and the rule itself is repealed by 62d rule. Hemmenway v. Fisher, 20 How. (U. S. 1857) 255. See The Scotland, 118 U. S. (1885) 507, 519; The Ann Caroline, 2 Wall. (U. S. 1864) 538, 550.

[12] The Scotland, 118 U. S. (1885) 507.

[13] The Robert Dollar (U. S. C. C. D. Wash.), 116 Fed. 79, per Hanford, Dist. J.

[14] The City of Hartford and The Unit, 97 U. S. (1877) 323. Circuit court is not bound to allow interest on costs awarded by district court. The Scotland, 118 U. S. (1885) 507.

[15] Canter v. American, etc., Ins. Co., 3 Pet. (U. S. 1830) 307; Harmony v. U. S., 2 How. (U. S. 1844) 210.

[16] The America, 92 U. S. (1875) 432.

of their duty, and an appeal bond may be treated as an admiralty stipulation; nor does the limitation of liability statute release stipulators from the payment of costs in the district court, or of costs on appeal, or of interest in the nature of damages occasioned by the appeal.[17] The value of the vessel, without interest, was given, however, in a proceeding in rem, where the value of the offending vessel was fixed in stipulations that had been entered into to procure her discharge at that identical sum.[18] But there can be no judgment or decree directly against the United States for costs and expenses.[19]

§ 1009. Same subject concluded.—Upon restoration, after seizure and detention, interest upon the value of the cargo will be allowed, and if the cargo has been sold, the gross amount of sales with interest is allowed as damages, and an addition of ten per cent is sometimes made where the property has been sold under disadvantageous circumstances. Counsel fees may also be given, both as damages or costs, both on the instance and prize side of the court.[20] Counsel fees are not allowed to the counsel of the gaining side in admiralty, as an incident to the judgment beyond the costs and fees allowed by statute.[21]

[17] The "Wanata," 95 U. S. (1877) 600. When stipulators for costs and for release of vessel liable for interest, see The Sydney (U. S. C. C. S. D. N. Y.), 47 Fed. 260.

[18] The Ann Caroline, 2 Wall. (U. S. 1864) 538. When interest not recoverable generally, see Burrill v. Crossman (U. S. C. C. A. 2d C.), 62 U. S. App. 368; 33 C. C. A. 663; 91 Fed. 543; The Switzerland (U. S. C. C. E. D. N. Y.), 67 Fed. 617; The North Star (U. S. C. C. A. 6th C.), 62 Fed. 71; The Battler (U. S. D. C. E. D. Pa.), 58 Fed. 704; The C. P. Raymond, 36 Fed. 336.

[19] The Antelope, 12 Wheat. (U. S. 1827) 546.

[20] The Appollon, 9 Wheat. (U. S. 1824) 362. Decree in an instance case was affirmed with damages at the rate of six per cent per annum on the amount of the appraised value of the cargo, including interest from date of the decree of condemnation in the district court. The Diana, 3 Wheat. (U. S. 1818) 58. If prize be sold by agreement, and the money be stopped in the hands of the marshal, by a third party, interest only will be allowed and not increased damages. The Perseverance, 3 Dall. (U. S. 1797) 336.

[21] The Baltimore, 8 Wall. (U. S. 1869) 377, under the statute of February 26, 1853, 10 Stat. at L. 161, a docket fee of $20 was taxed if the libellant recovered $50, but if he recovered less than $50, only $10 could be taxed. Id. As to counsel fees being allowed as expenses of prosecuting an appeal to the circuit court and to the supreme court in an admiralty case, see Canter v.

Nor will counsel fees for defending a suit be included in the damages in case of collision.[22] But interest from the date of completion of salvage services may be allowed on a salvage award.[23] Again, under the Oregon boat lien law, interest from the commencement of the action may be included in the judgment.[24] And interest will be allowed in a collision case where an appeal is not well founded.[25]

§ 1010. Admiralty decree—Computation of damages when gold above par.—The value of the cargo in gold on the day and at the place of shipment, converting that value, at the same time, into legal tender notes, at the rate at which such notes stood, as compared with gold on the day of shipment, is the proper method of computing damages on a cargo shipped when gold was above par and wrecked during transportation, and the computation should not be based upon the rate at which gold stood when the decree was rendered.[26]

§ 1011. Marine torts—Generally—Damages—Miscellaneous decisions.—If a vessel is sunk through the negligence of a United States marshal, in whose custody such vessel is, he is liable in damages to the amount necessary to raise and restore her to her condition before such loss.[27] And where a vessel is capsized by negligently putting cargo on board, damages are recoverable for injury to said vessel and to so much of the cargo as is allowed to be loaded, but nothing can be recovered for damages to cargo put on board such vessel without authority.[28] Again, damages for lumber lost and the expenses of saving the balance

American, etc., Ins. Co., 3 Pet. (U. S. 1830) 307.

[22] Greenwood v. The Fletcher (U. S. D. C. S. D. N. Y.), 42 Fed. 504.

[23] The Haxby (U. S. C. C. A. 4th C.), 42 U. S. App. 616 (see note); 28 C. C. A. 38; 83 Fed. 720.

[24] The Victorian Number 2, 26 Or. 194; 41 Pac. 1103; 46 Am. St. Rep. 616.

[25] The Lucille, 15 Wall. (U. S. 1872) 676.

[26] The Vaughan and The Telegraph, 14 Wall. (U. S.) 258. See generally Gregory v. Morris, 96 U. S. 619; Ames v. Quimby, 96 U. S. 324; Legal Tender Cases, 12 Wall. 457, 624; id. 110 U. S. 421; id. 11 Wall. 682; Trebilcock v. Wilson, 12 Wall. (U. S.) 687; Butler v. Horwitz, 7 Wall. (U. S.) 258; Bronson v. Rhodes, 7 Wall. (U. S.) 229.

[27] United States, Nixon v. Harrah (U. S. C. C. W. D. Pa.), 21 Pitts. L. J. N. S. 393.

[28] The Iniziativa (U. S. D. C. S. D. N. Y.), 50 Fed. 229.

may be recovered against a tug towing a lumber raft and negligently wrecking the same.[29] And the cost of replacing a vessel lost by experimental building and remodeling her is the measure of damages.[30] Again, a shipowner is liable, to the extent of the damages awarded him for a collision, to the creditors of his ship.[31]

[29] The Henry Buck (U. S. D. C. D. S. C.), 39 Fed. 211.

[30] The City of Alexandria (U. S. D. C. S. D. N. Y.), 40 Fed. 697.

[31] O'Brien v. Miller, 168 U. S. 287; 42 L. Ed. 469; 18 Sup. Ct. 140 (under U. S. Rev. Stat. secs. 4282 et seq.).

CHAPTER XLI.

SALVAGE.

§ 1012. Salvage—Defined.
1013. Salvage—Danger from fire.
1014. Underlying principles of salvage.
1015. Salvage—When and to whom allowed—Generally.
1016. Same subject continued.
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1018. Salvage — Compensation under contract.
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1020. Salvage as affecting loss or damages—Insurance.
1021. Salvage and consequent expenses as damages.
1022. Salvage—Bar to recovery—Effect of contract.
1023. Salvage—Amount of recovery and basis thereof.
1024. Same subject continued.

§ 1012. Salvage—Defined.—Salvage may be generally defined as remuneration for aid in cases of danger,[1] it being a reward or compensation for meritorious and useful service in saving a vessel or cargo, or lives of persons belonging to the vessel, from perils of the sea, enemies or pirates, and other impending dangers threatening their loss.[2]

[1] Hooper v. United States, 22 Ct. Cl. 408.

[2] See Anderson's Dict. L. citing The Clarita and The Clara, 23 Wall. (U. S.) 16–19; The Sabine, 101 U. S. 384–391, and other cases. See also The Connemara, 108 U. S. 352, 357 (saving from fire). As to lives of passengers, see Joyce on Ins. (ed. 1897) sec. 3442, p. 3321, note. "Salvage is service rendered in the rescue or relief of property at sea in imminent peril of loss or deterioration (The H. B. Foster, Abb. Adm. 222), of property on the sea, or wrecked on the coast of the sea (The Emulous, 1 Sum. [U. S.] 210), or on a public navigable river or lake where interstate or foreign commerce is carried on (The Circassian v. Two Ferry Boats, 2 Bond, 375; Tabor v. Jenny, 1 Sprague, 315; Abb. Adm. 293), the service which those, who recover property from loss or damages at sea, render to the owners with the responsibility of making restitution, and with a lien for their reward (The Clifton, 3 Hagg. Adm. 177); useful service of any kind (The Blackwall, 10 Wall. [U. S.] 1); for the relief of property from an impending peril, and the consequent ultimate safety of the same (Adams v. The Island City, 1 Cliff. [U. S.] 210). It must be from an impending peril, and not from a possible future peril (The Saragossa, 1 Ben. 557; The Emulous, 1 Sum. [U. S.] 207). The service must be voluntary, and not a service owed to the

§ 1013. Salvage—Danger from fire.—Saving a ship from imminent destruction by fire is as much salvage service as saving her from perils of the seas.[3]

§ 1014. Underlying principles of salvage.—The true principle of salvage is adequate reward according to the circumstances of the case.[4] And remuneration for salvage services is awarded to the owners of vessels on account of the danger to which the service exposes their property, and the risk which they run of loss in suffering their vessels to engage in such perilous undertakings.[5] But a right to compensation for salvage presupposes good faith, meritorious service, complete restoration, and incorruptible vigilance, so far as the property is within the reach or under the control of the salvors.[6] And a

property in person, or to its owner (The Clarita and The Clara, 23 Wall. [U. S.] 1). The term is used to denote the nature of the service, even when an absolute compensation is agreed on (The Williams, 1 Brown's Adm. 217; The Emulous, 1 Sum. [U. S.] 207; The Centurion, 1 Ware, 477; Bearse v. Pigs of Copper, 1 Story, 314; Adams v. The Island City, 1 Cliff. 210; McGinnis v. The Pontiac, 5 McLean, 359; Fretz v. Bull, 12 How. [U. S.] 466; The A. D. Patchin, 1 Blatchf. 420; Baker v. Hoag, 7 N. Y. 557; The M. B. Stetson, 1 Low. 119). Salvage is a compensation or reward of those who engage in a salvage service, and is participated in only by those who actually effect the rescue (Waterbury v. Myrick, Blatchf. & H. 44; The San Bernardo, 1 C. Rob. 178), and of the property actually charged with it (Clarke v. The Dodge Healy, 4 Wash. C. C. 657; Talbot v. Seeman, 1 Cranch [U. S.]. 1); the allowance for saving a ship or goods from the damages of the seas, from fire, pirates or enemies (Weeks v. The Catharine Maria, 2 Pet. Adm. 424; Lee v. The Alexander, 2 Paine, 466); the compensation allowed to other persons by whose assistance a ship or its loading may be saved from impending peril, or recovered after actual loss (Spencer v. The Charles Avery, 1 Bond, 121);" Desty's Ship. & Adm. (ed. 1879) sec. 303.

[3] The Connemara, 108 U. S. 352, 357; The Arkansas (U. S. D. C. D. N. J.), 84 Fed. 361; The General Knox (U. S. D. C. E. D. N. Y.), 74 Fed. 575. See decisions in note at end of this chapter, under heading "Saving from danger by fire." But see Fireman's Charitable Assoc. v. Ross (U. S. C. C. A. 5th C.), 60 Fed. 456, hold that fireman's association could not recover salvage.

[4] Post v. Jones, 19 How. (U. S.) 150. See The Connemara, 108 U. S. 359. The Sybil, 4 Wheat. (U. S.) 98.

[5] The Blackwall, 10 Wall. (U. S.) 1, 13.

[6] The Island City, 1 Black. (U. S.) 121. The right to salvage may be forfeited by spoliation, smuggling or other gross misconduct of the salvors. The Bello Corrunes, 6 Wheat. (U. S.) 152; The Blaireau, 2 Cr. (U. S.) 240. As to embezzlement by salvors, see The Island City, 1 Black.

highly meritorious and useful service to the proprietors of the ship and cargo is, by the general principles of the maritime law, always deemed a just foundation for salvage.[7] Again, it is essential that the service rendered has contributed immediately to the preservation or rescue of the property in peril, no allowance of salvage being made for unsuccessful attempts at rescue.[8]

§ 1015. Salvage—When, and to whom allowed—Generally.—If the vessel is not so disabled as to justify any reasonable apprehension for her safety, and is in no immediate peril, the service may become one of towage merely, to be compensated on that basis, and not a salvage service.[9] The fact, however, that a vessel is in distress justifies a recovery for salvage service rendered, even though she is not in immediate peril.[10] Again, there may be a salvage service which is not of a high order of merit, but nevertheless a salvage compensation will be justified, as where a steamer becomes partially disabled at a place where violent storms prevail at that season.[11] And a tug may be entitled to compensation as for salvage services, where a stranded vessel is kept in such a position by towing that further loss or damage is avoided and her cargo is thereby saved and freight earned.[12] So a steamship may be entitled to salvage, but subject

(U. S.) 121. As to misconduct justifying a material reduction of salvage allowance, see The Henry R. Tilton (U. S. D. C. S. D. N. Y.), 53 Fed. 139. Fraudulent attempt to bribe master of stranded vessel to agree to excessive payment, etc., will not operate as a forfeiture, when not known to the owners of the vessels engaged in rendering salvage services. The Gov. Ames (U. S. C. C. A. Tex.), 48 C. C. A. 170; 108 Fed. 969.

[7] The Amistad, 15 Pet. (U. S.) 518.

[8] The Golden Gate (U. S. D. C. D. N. J.), 57 Fed. 661. See also Desty's Ship. & Adm. (ed. 1879) sec. 315. Parties who find a derelict at sea, and carry her into port, are entitled to the usual salvage without regard to meritorious but unsuccessful efforts previously made to rescue her by other parties. The Island City, 1 Black. (U. S.) 121.

[9] The J. C. Pfluger (U. S. D. C. Cal.), 109 Fed. 93. See The Weber Bros. (U. S. D. C. E. D. N. Y.), 88 Fed. 92; The Golden Gate (U. S. D. C. D. N. J.), 57 Fed. 661; The Sirius (U. S. C. C. A. 9th C.), 6 C. C. A. 614; 57 Fed. 851.

[10] The Catalina (U. S. C. C. A. La.), 44 C. C. A. 638; 105 Fed. 633.

[11] The Santa Ana (U. S. D. C. D. Wash.), 107 Fed. 527. See The New Camelia (U. S. C. C. A. La.), 44 C. C. A. 642; 105 Fed. 637; The Catalina (U. S. C. C. A. La.), 44 C. C. A. 638; 105 Fed. 633; The Barnegat (U. S. D. C. S. D. N. Y.), 55 Fed. 92.

[12] The Madras [1898], P. 90; 78 Law T. Rep. 325; 67 L. J. P. D. & A. N. S. 53.

to a reduction, where she tows another disabled steamer in tempestuous weather to a place where she is likely to and does meet another vessel which rescues her; and so, even though stress of weather compels the first salvor to abandon the disabled steamer.[13]

§ 1016. Same subject continued.—A situation of extreme peril of a large passenger steamer, almost completely disabled off a rocky coast in the worst season for storms, and with wind and tide setting against her, justifies a compensation as for salvage to tugboats which tow her into port; and so, even though such boat's regular business is towage under contract.[14] And tugs may recover salvage where they tow a steamer to shore and beach her, thereby relieving her from the immediate danger of sinking, consequent upon a collision.[15] So a tug, which goes to a steamer in a dangerous position on rocks and remains by her all night, keeping down the water in her hold, is entitled to salvage, even though said steamer is pulled off by other tugs.[16] So the certainty that serious injury would have resulted to the cargo and probably to the ship, except for the efforts of a tug in holding a steel bark off a beach near which she had drifted on a stormy night with a gale blowing, is a determining factor justifying a salvage award, especially where the tug exerted herself to the utmost and severely strained her machinery.[17] Again, a derelict is subject to salvage by any vessel which finds her.[18] And personal property of the United States on board a vessel for transportation is liable to salvage.[19] But a floating dry dock permanently moored is not the subject of such service.[20]

[13] The Strathnevis (U. S. D. C. D. Wash.), 76 Fed. 855.

[14] The City of Puebla (U. S. D. C. D. Wash.), 79 Fed. 982. See Transfer No. 1 (U. S. D. C. S. D. N. Y.), 53 Fed. 610.

[15] The George W. Clyde (U. S. D. C. E. D. N. Y.), 80 Fed. 157. See this case also for nonallowance to a tug for salvage.

[16] The Lucy P. Miller (U. S. D. C. D. N. Y.), 48 Fed. 121.

[17] The Sir Robert Fernie (U. S. D. C. Wash.), 96 Fed. 348.

[18] The Canada (U. S. D. C. D. Alaska), 92 Fed. 196. See this case also as to what constitutes a derelict. The Island City, 1 Black. (U. S.) 121.

[19] The Davis, 10 Wall. (U. S.) 15. See United States v. Morgan, 99 Fed. 573.

[20] Cope v. Vallette Dry Dock Co., 119 U. S. 625. See In re Hydraulic Steam Dredge No. 1, 80 Fed. 556.

§ 1017. Same subject concluded.—Generally, only those persons not bound by legal duty to render such services can claim salvage compensation.[21] Pilots and seamen may, however, under certain circumstances, become entitled to salvage.[22] So, after a ship in imminent peril is voluntarily stranded, the crew are entitled to their wages while employed in saving the cargo.[23] And the officers and crew of a ship of war are entitled to salvage, for the recapture of an armed neutral vessel from a foreign belligerent, by whom she had been manned with a prize crew.[24] Again, a passenger may become entitled to salvage,[25] as may a corporation, the business of which is that of a wrecker and salver.[26] But the owners of a vessel, who, through their own carelessness or that of their captain, set fire to another vessel, cannot claim salvage for putting that fire out.[27]

[21] The C. F. Bielman (U. S. D. C. Wis.), 108 Fed. 878.

[22] The Hope, 10 Pet. (U. S.) 108. See The C. P. Minch, 73 Fed. 859; 61 Fed. 511. As to pilot boat; allowance when made, and rule against liberal salvage to, see The Relief (U. S. D. C. Md.), 51 Fed. 252. As to right of seamen to salvage; when and when not entitled, see The C. F. Bielman (U. S. D. C. Wis.), 108 Fed. 878. As to award to officers and seamen generally and division of salvage money, see Ulster S. S. Co. v. Cape Fear T. & T. Co. (U. S. C. C. A. 5th C.), 36 C. C. A. 201; 94 Fed. 214; Cape Fear T. & T. Co. v. Pearsall (U. S. C. C. A. 4th C.), 61 U. S. App. 521; 33 C. C. A. 161; 90 Fed. 435; The Wellington (U. S. D. C. N. D. Cal.), 54 Fed. 901; Scows 3, 16 and 17 (U. S. D. C. S. D. N. Y.), 50 Fed. 570; The Rahway (U. S. D. C. E. D. N. Y.), 46 Fed. 809; The New Orleans, 23 Fed. 909; The Adirondack, 5 Fed. 213; The William Penn, 2 Hughes (U. S.), 144; Fed. Cas. No. 1, 965; The Henry Ewbank, 1 Sumn. (U. S.) 400; Fed. Cas. No. 6, 376.

[23] Barnard v. Adams, 10 How. (U. S.) 270. See as to general average, Joyce on Ins. (ed. 1897) secs. 3400–3444. See Hobson v. Lord, 92 U. S. 397, 411; Ralli v. Troop, 157 U. S. 386, 395; The Irrawaddy, 171 U. S. 187.

[24] The Amelia, 4 Dall. (U. S.) 34; The Amelia, 1 Cr. (U. S.) 1; Talbot v. Seeman, id., holding also that to support a demand for salvage, the recapture must be lawful and a meritorious service must be rendered, although probable cause is sufficient to render the recapture lawful. See The Eliza, 4 Dall. (U. S.) 37, 42 (under Act, March 2, 1799); Hooper v. United States, 22 Ct. Cl. 408. See as to prize of war as salvage, The Adventure, 8 Cr. (U. S.) 221.

[25] De Leon v. Leitch (U. S. D. C. E. D. La.), 65 Fed. 1002. A passenger on board ship, as well as the owner, officers, crew and passengers of a tug may share in the salvage where a fire is put out by them which endangered the ship and cargo, they being unaided by the officers and crew of the ship. The Connemara, 108 U. S. 352.

[26] The Excelsior, 123 U. S. 40.

[27] The Clarita and The Clara, 23 Wall. (U. S.) 1.

§ 1018. Salvage—Compensation under contract.—Inasmuch as questions relating to salvage contracts are important here only in connection with the amount of compensation recoverable or as affecting the right to recover, they will only be briefly noticed. It may be stated generally, however, that courts of admiralty will enforce contracts made for salvage service and salvage compensation, where the salvor has not taken advantage of his power to make an unreasonable bargain; but they will not tolerate the doctrine that a salvor can take advantage of his situation, and avail himself of the calamities of others to drive a bargain; nor will they permit the performance of a public duty to be turned into a traffic of profit;[28] and a contract of salvage, which the master has been corruptly or recklessly induced to sign, will be wholly disregarded; but if the contract has been fairly entered into, with full knowledge of all the facts, and no fraud or compulsion exists, the mere fact that it is a hard bargain or that the service was attended with greater or less difficulty will not justify setting it aside. Again, the contract is not necessarily bad, merely because the compensation agreed upon is greater than a quantum meruit, especially so when dependent upon success within a limited time; not will the courts of this country treat the contract as of no effect because made when the vessel is in danger, and if especial care and prudence was exercised in making a contract, it will be upheld.[29]

[28] Post v. Jones, 19 How. (U. S.) 150.

[29] The Elfrida, 172 U. S. 186; 19 Sup. Ct. Rep. 146; 43 L. Ed. 278, a case where the leading decisions are fully considered. See *S. C.*; 41 U. S. App. 585; 23 C. C. A. 527; 77 Fed. 754. As to salvage contracts and enforcement, validity and invalidity of same, see The Tornado, 109 U. S. 110; The North Carolina, 15 Pet. (U. S.) 40; The Thornley, 98 Fed. 743, 744; The Burlington (U. S. C. C. E. D. Mich.), 73 Fed. 258; The Clandeboye (U. S. C. C. A. 4th C.), 25 U. S. App. 453; 17 C. C. A. 300; 70 Fed. 631; The Sirius (U. S. C. C. A. 9th C.), 6 C. C. A. 614; 57 Fed. 851, 857; 53 Fed. 611; The Alert (U. S. D. C. S. D. N. Y.), 56 Fed. 721; The Richard S. Garrett (U. S. D. C. S. D. N. Y.), 55 Fed. 90; The Sir William Armstrong (U. S. D. C. E. D. Va.), 53 Fed. 145; The Agnes I. Grace (U. S. C. C. A. 5th C.), 2 U. S. App. 317; 2 C. C. A. 581; 51 Fed. 958; The Kimberly (U. S. D. C. E. D. Va.), 40 Fed. 289; Scott v. 445 Tons Coal (U. S. D. C. D. Conn.), 39 Fed. 285; The Inchmaree [1899], P. 111; 68 L. J. P. D. & A. N. S. 30; 80 Law T. N. S. 201; 8 Asp. 486; The Solway Prince [1896], P. 120; 65 L. J. P. D. & A. N. S. 45; 74 Law T.

§ 1019. Salvage—Relation of, to damages.—It will be seen from the preceding sections[30] that salvage, within its strict meaning, is a compensation or reward for meritorious services of a nature peculiar to certain perils and property or lives, such service being voluntary, although it may arise out of contract; while, as we have stated elsewhere, damage is a compensation or indemnity recoverable by, or awarded to, one who has sustained damage, or it is the compensation awarded against a wrongdoer.[31] Again, there is no precedent for a suit in a common-law court, for salvage on the high seas.[32]

§ 1020. Salvage as affecting loss or damages—Insurance.—Salvage may be added in the ascertainment of loss on cargo.[33] It may also be added with jettison expenses in the aggregation of losses under an insurance policy;[34] so charges due salvors may be added to the expense of repairs of the vessel;[35] and damage allowed in case of capture, condemnation, sale and restoration of proceeds, may be considered as salvage on freight.[36] So, under an insurance policy, articles replaced in repairs of a ship may be considered as salvage and their proceeds deducted from the gross loss;[37] and salvage expenses, where a vessel is stranded, may come into general average for which the cargo insurers will be liable in their proportion.[38] But in case of memorandum articles of one species, underwriters are not liable

Rep. 32; The Strathgarry [1895], P. 264; 64 L. J. P. D. & A. N. S. 59; The Edenmore [1893], P. 79; The Mark Lane, L. R. 15 P. D. 135; The Dracona v. Connolly, 5 Can. Exch. 207; Connolly v. The Dracona, 5 Can. Exch. 146; Dunsmuir v. The Harold, 4 Can. Exch. 222; Couette v. Reg., 3 Can. Exch. 82.

[30] See secs. 1012–1014 herein, definitions, underlying principles, etc.

[31] See secs. 1, 2, 3, 61, herein.

[32] Desty's Ship. & Adm. (ed. 1879) sec. 330, citing Brevoor v. The Fair American, 1 Pet. Adm. 187.

[33] Roselto v. Gurney, 20 L. J. Com. P. 257; 15 Jur. 1177; 11 Com. B. 176, 182, 190; Joyce on Ins. (ed. 1897) sec. 3099.

[34] Gazzam v. Cincinnati Ins. Co., 6 Allen (Mass.), 71; Joyce on Ins. (ed. 1897) sec. 2715.

[35] Young v. Union Ins. Co., 24 Fed. 279; Orrok v. Com. Ins. Co., 21 Pick. (Mass.) 456. See Hall v. Ocean Ins. Co., 21 Pick. (Mass.) 472, Joyce on Ins. (ed. 1897) sec. 3096.

[36] Coggeshall v. Read, 5 Pick. (Mass.) 454; Joyce on Ins. (ed. 1897) sec. 2980.

[37] Joyce on Ins. (ed. 1897) sec. 3082, note.

[38] Heyliger v. New York F. Ins. Co., 11 Johns. (N. Y.) 85; Joyce on Ins. (ed. 1897) sec. 3425, p. 3296.

for salvage under the sue and labor clause, unless, perhaps, an actual loss of the cargo may have been prevented by the salvage.[39] Again, expenses incurred by an insurance company in floating a stranded vessel, there being no abandonment or right to abandon, does not entitle such company to a salvage lien upon the vessel.[40]

§ 1021. Salvage and consequent expenses as damages.—Salvage may be recoverable as damages occasioned by a collision when paid upon a compromise.[41] So salvors and the owners of a vessel may become liable for depreciation of value of a vessel and cargo,[42] and injuries to a salving vessel consisting of some distinct damage occasioned in rendering salvage services will be compensated for.[43] Again, recovery may be had upon the basis of a quantum meruit in addition to salvage services in saving a stranded vessel and her cargo.[44] But where two vessels were in collision, the cost of a libel for salvage services cannot be recovered by one against the other, where the latter was not in fault for inclusion in the libel and the claim against the former was without foundation,[45] and where, through a tug's negligence in anchoring a vessel, she was driven to sea, the costs and expenses of a salvage suit, paid by the vessel owner, cannot be recovered from such tug.[46]

§ 1022. Salvage—Bar to recovery—Effect of contract.—Nothing short of a contract to pay a fixed sum at all events, whether successful or unsuccessful, will bar a meritorious claim for salvage. And a salvage service is none the less so, because it is rendered under a contract which regulates the mode of as-

[39] Biays v. Chesapeake Ins. Co., 7 Cranch (U. S.), 415; Joyce on Ins. (ed. 1897) sec. 2818, pp. 2762, 2763. See Insurance Co. v. Fogarty, 19 Wall. (U. S.) 640, 643; Moreau v. United States Ins. Co., 1 Wh. (U. S.) 219, 227.

[40] The Lydia A. Harvey (U. S. D. C. D. Mass.), 84 Fed. 1000.

[41] La Champagne (U. S. D. C. D. N. Y.), 53 Fed. 398.

[42] The Canada (U. S. D. C. D. Alaska), 92 Fed. 196.

[43] The Niagara (U. S. D. C. S. D. N. Y.), 89 Fed. 1000.

[44] The Lamington (U. S. D. C. E. D. N. Y.), 80 Fed. 159.

[45] The Glencairn (U. S. D. C. D. Or.), 78 Fed. 379.

[46] The C. R. Stone (U. S. D. C. S. D. N. Y.), 68 Fed. 934.

certaining the compensation to be paid, but makes the payment of any compensation contingent upon substantial success.[47]

§ 1023. Salvage—Amount of recovery and basis thereof.—It may be stated as a general rule that the value of salvage services is estimated upon the character or kind of the salved and salving vessel; the value of the property saved and restored, including the value of the vessel, and of the cargo and freight, if any; the value of the rescuing vessel, and of her cargo and freight if any; the extent and nature of the danger and the imminency of the peril to which both vessels are exposed; the loss, if any, sustained by the rescuing vessel by way of deviation, delays, actual losses, such as loss of hawsers, etc.; the time occupied and the labor involved in effecting the salvage; the situation of the endangered vessel with reference to distance from a port of safety, or from the track of vessels, or nearness to other vessels and the availability of probable help; whether the salvor is a specially equipped vessel for salvage service or otherwise; cash outlays for the adventure and readiness and ability to perform the service; the exertions required in effecting the salvage; the merit of the services rendered; aid given by other vessels at the time, or the readiness of such other salvors to help, and the efficiency and relative degree of the labor of a particular salvor, where several vessels are engaged in the service. There are also various other factors peculiar to particular cases which should be considered.[48]

[47] The Camanche, 8 Wall. (U. S.) 448. See The Excelsior, 123 U. S. 40, 49; Desty's Ship. & Adm. (ed. 1879) sec. 329. When contract does not bar meritorious claim for salvage in addition to quantum meruit, The Kimberly (U. S. D. C. E. D. Va.), 40 Fed. 289; and see The Hestia [1895], P. 193; 64 L. J. P. D. & A. N. S. 82. One who has stipulated to raise a sunken vessel cannot abandon it and claim salvage. Bondies v. Sherwood, 22 How. (U. S.) 240.

[48] See The Elm Branch (U. S. D. C. Wash.), 106 Fed. 952; The Niagara (U. S. D. C. S. D. N. Y.), 89 Fed. 1000; The Lamington (U. S. C. C. C. A. 2d C.), 57 U. S. App. 653; 30 C. C. A. 271; 86 Fed. 675, rev'g 80 Fed. 159; The St. Paul (U. S. C. C. C. A. 2d C.), 57 U. S. App. 688; 30 C. C. A. 70; 86 Fed. 340, The Haxby (U. S. C. C. C. A. 4th C.), 42 U. S. App. 610; 28 C. C. C. A. 33; 83 Fed. 715; The Laura (U. S. C. C. C. A. 5th C.), 52 U. S. App. 282; 27 C. C. A. 540; 83 Fed. 311; The R. R. Rhodes (U. S. C. C. C. A. 6th C.), 54 U. S. App. 238; 27 C. C. A. 258; 82 Fed. 751; The Monticello (U. S. D. C. N. D. Cal.), 81 Fed. 211; The Burlington (U. S. C. C. E.

§ 1024. Same subject continued.—If the amount of salvage is not regulated by statute, it must be determined by the principles of general law.[49] And it is largely a matter of discretion, which cannot be reduced to precise rules, but depends upon a consideration of all the circumstances of the case,[50] and with these in view, a fair compensation should be allowed, although there is no scale of adjustment in admiralty upon a percentage basis.[51] So it has been declared in an Hawaiian decision that in salvage cases there is no fixed rule by which the percentage of the value salved should be awarded, but that such awards are largely within the discretion of the trial judge, and while the amount for which a vessel may have been insured may be considered as a circumstance in arriving at its value after a marine disaster, it is not direct evidence to that effect, nor can it be considered as conclusive as against more positive evidence of value, as in case of the result of an actual sale. The amount awarded, while it ought not to be exorbitant, should be liberal, to encourage such service.[52] Again, in cases of salvage upon

D. Mich.), 73 Fed. 258; The Great Northern (U. S. D. C. E. D. Va.), 72 Fed. 678; The L. W. Perry (U. S. D. C. E. D. Wis.), 71 Fed. 745; The Beaconsfield (U. S. D. C. S. D. Ala.), 67 Fed. 144; The City of Haverhill (U. S. D. C. S. D. N. Y.), 66 Fed. 159; The Felix (U. S. D. E. D. Pa.), 62 Fed. 620; Campagnie Commerciale, etc., v. Clarente S. S. Co. (U. S. C. C. A. 5th C.), 60 Fed. 921; The William Smith (U. S. D. C. S. D. N. Y.), 59 Fed. 615; The Helen F. Robbins (U. S. D. C. E. D. N. Y.), 55 Fed. 1014; The Depuy de Lome (U. S. D. C. E. D. La.), 55 Fed. 93; The Tregurno (U. S. D. C. S. D. Fla.), 50 Fed. 946; Stebbins v. Five Mud Scows (U. S. D. C. S. D. N. Y.), 50 Fed. 227; The Eleanor (U. S. D. C. S. D. S. C.), 48 Fed. 842; The Tennasserim (U. S. D. C. S. D. Fla.), 47 Fed. 119; The Andrew Adams (U. S. D. C. D. Mass.), 36 Fed. 205; Conrad v. De Montcourt, 138 Mo. 311; 39 S. W. 805; The Emerald (C. A), [1896] P. 192; 65 L. J. P. D. & A. N. S. 69; 74 Law T. Rep. 645; The Georg [1894], P. 330; The Edenmore [1893], P. 79; The Dwina [1892], P. 58; The Wilhelm Tell [1892], P. 337. See as to derelict and factors in arriving at amount, The Janet Court [1897], P. 59; 66 L. J. P. D. & A. N. S. 34; 76 Law T. Rep. 172. See further the decisions cited under note to sec. 1024 herein, entitled "amounts awarded for salvage services."

[49] The Amelia, 1 Cr. (U. S.) 1; Talbot v. Seeman, id.

[50] The Connemara, 108 U. S. 352, 357, 359; The Amistad, 15 Pet. (U. S.) 518.

[51] The Elm Branch (U. S. D. C. Wash.), 106 Fed. 952.

[52] Wilders S. S. Co. v. Brig Lurline, 11 Hawaiian Rep. 83, per Whiting, J. See Compagnie Commerciale, etc., v. Clarente S. S. Co. (U. S. C. C. A. 5th C.), 60 Fed. 921, as to insurance as value of vessel.

the Great Lakes, no general rule can be given distinguishing such service from that rendered upon the high seas, other than the rule which bases each case upon its particular circumstances.[53] A different ratio of salvage will not, however, be assessed upon different parts of the property according to the labor relatively expended thereon, although it may be so assessed in furtherance of justice.[54] It is also a general rule that decrees in salvage will not be disturbed as to their amount, unless for a clear mistake, or gross over-allowance by the court below.[55]

[53] The R. R. Rhodes (U. S. C. C. A. 6th C.), 54 U. S. App. 238; 27 C. C. A. 258; 82 Fed. 751.

[54] Scott v. 445 Tons Coal (U. S. D. C. D. Conn.), 39 Fed. 385.

[55] The Camanche, 8 Wall. (U. S.) 448. See The Connemara, 108 U. S. 352, 359; The Excelsior, 123 U. S. 40. Under the act of Congress, February 16, 1875, ch. 77, a decree of salvage by the circuit court is not to be altered by the supreme court for excess in the amount awarded, unless the excess is so great that upon any reasonable view of the facts found, the award cannot be justified by the rules of law applicable to the case. The Connemara, 108 U. S. 352. See Irvine v. The Hesper, 122 U. S. 256; The E. A. Packer, 140 U. S. 362; The Hope, 10 Pet. (U. S.) 108. See also The Glengyle v. Neptune Salvage Co. (H. L.), [1898] A. C. 519; 78 Law T. Rep. 801; 67 L. J. P. D. & A. N. S. 87, aff'g (C. A.), [1898] P. 97; 67 L. J. P. D. & A. N. S. 12; 78 Law T. R. 139; The Accomac (C. A.), [1894] P. 349; The Oxford (U. S. C. C. A. 5th C.), 13 C. C. A. 647; 66 Fed. 590, rev'g 66 Fed. 584.

Amounts awarded for salvage services: $160,000 awarded wrecking companies for floating a stranded steamship. The St. Paul (U. S. D. C. S. D. N. Y.), 83 Fed. 104. $131,012.48 not disturbed on appeal, although vessel worth only $1,888,500, instead of $2,000,000. The St. Paul (U. S. C. C. A. 2d C.), 57 U. S. App. 688; 30 C. C. A. 70; 86 Fed. 340. $100,000 and costs allowed on appeal, against the ship, her cargo and freight money. The Kimberly (U. S. C. C. E. D. Va.), 40 Fed. 916. £19,000 allowed steamers specially equipped and ready for such service; vessel and cargo would probably have been lost; value of same was £76,000. The Glengyle v. Neptune Salvage Co. (H. L.), [1898] A. C. 519; 78 Law T. Rep. 801; 67 L. J. P. D. & A. N. S. 87, aff'g (C. A.), [1897] P. 97; 67 L. J. P. D. & A. N. S. 12; 48 Law T. Rep. 139. $35,000 reduced to $20,000, for towage 300 miles of a steamer disabled by a broken shaft, valued with cargo and freight at $165,000, there being no unusual service or danger. The Phœnix (U. S. C. C. A. 4th C.), 10 C. C. A. 506; 62 Fed. 487. $30,000 awarded for towing steamer at a delay of 12 days, her thrust shaft being disabled; value of steamer and cargo and number of passengers on board considered, as were also the skill required in the service and injury to the master. The Hekla (U. S. D. C. E. D. N. Y.), 62 Fed. 941. $27,500 reduced to one sixth of $100,000, the steamer's value. There was no extraordinary peril, the vessel having run ashore, and a life saving station being near, and the

sailor's lives were not endangered. The Haxby (U. S. C. C. A. 4th C.), 42 U. S. App. 610; 28 C. C. A. 33; 83 Fed. 715. $25,000 allowed; vessel had broken her tunnel shaft, but it was temporarily repaired, and salvage was rendered in response to signals of distress, she being about 750 miles from New York; vessel with cargo and freight was valued at about $500,000, and carried 220 passengers. The rescuing steamer was valued at $400,000, and carried 461 passengers. The weather was stormy, followed by gales after reaching port. The Italia (U. S. D. C. E. D. N. Y.), 42 Fed. 416. $20,500 awarded to owners of steamer and crew; rescued steamer was in peril and disabled off a lee shore; rescuing vessel lost a hawser and four days' deviation; she was valued with cargo and freight at $216,850. The Strathnevis (U. S. D. C. D. Wash.), 76 Fed. 855. $18,000 awarded; steamer had broken shaft, was out of track of vessels and dangerously near Sable islands, but her danger was not imminent; value with cargo $384,000; rescuing steamer's value was $90,000. The Obdam (U. S. C. C. D. N. J.), 72 Fed. 543. $17,956.58 reduced to fifty per cent of the net proceeds, which was above that usually allowed in similar cases, the net value of vessel and cargo being but $17,160.32; there had however been over $5,000 expended in cash for the adventure. The Lamington (U. S. C. C. A. 2d C.), 57 U. S. App. 653; 30 C. C. A. 271; 86 Fed. 675, rev'g 80 Fed. 159. $17,500 allowed for towing steamer into port in a fog; value of steamer, cargo and freight was $426,000. The Dania (U. S. D. C. E. D. N. Y.), 70 Fed. 398. $17,000 awarded; three-masted ship was brought 300 miles into port; the value of the vessel, cargo and gross freight was $218,000, and all of her crew were sick and disabled; value of rescuing steamer was $175,000 and time spent was 11 days. The T. F. Oakes (U. S. D. C. E. D. N. Y.), 87 Fed. 229. $16,950 awarded and apportioned among owners, master, mate, chief engineer, assistant engineer, cabin boy and employees of tug; she was worth $65,000 and lost a hawser; the rescued vessel was a steamer valued with her cargo at $343,000, and was in imminent danger. The City of Puebla (U. S. D. C. D. Wash.), 79 Fed. 982. £3,000 allowed for towing 850 miles into port a dismantled derelict; rescuing vessel was delayed 13 days; value of her cargo and freight was £17,346; value of derelict and cargo was £7,350. The Janet Court [1897], P. 59; 76 Law T. Rep. 172; 66 L. J. P. D. & A. N. S. 34. $11,500 awarded licensed wreckers employing therefor 18 or 19 vessels and 120 to 130 men, and a tug also aided for a short time; there was considerable danger from storms, and vessel was grounded on reef off lonely coast, her value with cargo was over $200,000. The Alexandra, (U. S. D. C. S. C.), 104 Fed. 904. $10,000 awarded to tug; vessel rescued was stranded steamer in perilous position; her value with cargo and freight was about $100,000; tug was valued at $50,000 and went 80 miles upon contingency. The North Erin (U. S. D. C. E. D. N. Y.), 71 Fed. 430. $8,500 and additional expenses awarded to steamship for towing disabled steamer; no particular difficulty was occasioned; rescued vessel worth with cargo $240,000; rescuing vessel worth with cargo $460,000. The Florence (U. S. D. C. S. D. N. Y.), 65 Fed. 248. $8,000 allowed freight steamer acting as rudder; delayed 4 days, La Hesbaye (U. S.

D. C. E. D. N. Y.), 71 Fed. 742. $7,500 allowed freight steamer for towing from near edge of gulf stream a vessel without fuel and burning her fixtures; value of salvor $250,000; value of rescued vessel, cargo and freight £31,000. The Alaska (U. S. D. C. E. D. N. Y.), 75 Fed. 430. $7,100.84 awarded; steamer was grounded on sandy and rocky shoal; rescuing vessel was in peril. The Niagara (U. S. D. C. S. D. N. Y.), 89 Fed. 1000. $6,500 awarded; vessel aground and worth $305.888; tugs worth $35,000. Ulster S. S. Co. v. Cape Fear Towing & Tr. Co. (U. S. C. C. A. 5th C.), 36 C. C. A. 201; 94 Fed. 214. $6,000 for salvage services of tugs in saving schooner ashore within dangerous place; $1,100 paid for assistance. Morse v. Pomroy Coal Co. (U. S. D. C. D. R. I.), 75 Fed. 428. $6,000 and actual expenses and costs allowed steamer for deviating and towing disabled steamer; value of each vessel considered. Royal West India Co. v. The City of Para (U. S. D. C. E. D. Va.), 69 Fed. 479. $5,500 awarded 3 tugs; vessel aground and in danger of total loss; there were however other tugs present and ready to aid; value of vessels considered. The Don Carlos (U. S. D. C. N. D. Cal.), 47 Fed. 646. $5,000 awarded; steamer disabled but not helpless; danger in rescuing not great; value considered of steamer, etc. The Dessoug (U. S. D. C. E. D. S. C.), 61 Fed. 697. $5,000 awarded 2 tugs of same owner for towing vessel off lee shore in danger of going on reef; tugs were kept in readiness constantly for cases of distressed vessels; danger to tugs not great. The Jessomene (U. S. D. C. N. D. Cal.), 47 Fed. 908. $4,500 allowed tugs maintained for salvage purposes, towage, etc. Wilmington Transp. Co. v. The Old Kensington (U. S. D. C. S. D. Cal.), 39 Fed. 496. $4,000 allowed steamship with a valuable cargo and at delay of voyage for towing helpless coal barge adrift with her cargo in a rough sea and a gale. The Albany (U. S. D. C. D. Mass.), 42 Fed. 64. $3,600 awarded for towing into port a steamer helpless on Lake Michigan. The Spokane (U. S. D. C. E. D. Wis.), 67 Fed. 254. $3,500 to officers and crew and extra allowance to seamen. The Winifred, 102 Fed. 988. $3,000 allowed. The Vila (U. S. D. C. E. D. N. Y.), 63 Fed. 1017. $2,500 awarded and $100 to each of the crew; steamer adrift. The Wellington (U. S. D. C. N. D. Cal.), 52 Fed. 605. $2,400 awarded steamer in ballast for towage and salvage service rendered steamer in ballast with broken propellor shaft, the service not being of a high order of merit. The Catalina (U. S. C. C. A. La.), 44 C. C. A. 638; 105 Fed. 633. $2,216.66⅔ awarded steamer towing steamer 520 miles to mouth of Mississippi river. The Gambetta (U. S. C. C. A. 5th C.), 41 U. S. App. 11; 20 C. C. A. 417; 74 Fed. 259. $1,500 awarded passenger steamboat for towing disabled freight steamer. The Waverly (U. S. D. C. E. D. Wis.), 78 Fed. 191. $1,000 allowed tug for towing rudderless steamer aground in shoal water in rough sea; no danger to tug. The Grace Dollar (U. S. D. C. Cal.), 103 Fed. 665. $1,000 allowed; $2,000 excessive for towage by passenger steamer; services took an hour, and no great danger was incurred; schooner saved was aground and in great danger of being lost; her value was $8,000, and value of steamer was $16,000. The Penobscott (U. S. C. C. A. N. C.), 45 C. C. A. 372; 106 Fed. 419. $1,000 and price of hawser allowed passenger steamer for aiding tug in floating three-masted schooner. South

Carolina S. S. Co. v. The Nellie Floyd (U. S. D. C. D. S. C.), 39 Fed. 221. $1,000 for salvage service upon cargo, where great pecuniary risk to salvor involved. Scott v. 445 Tons Coal (U. S. D. C. Conn.), 39 Fed. 285. $1,000 allowed to tug equipped therefor, in towing steamer 15 miles to dock. The Schiedam (U. S. D. C. S. D. N. Y.), 48 Fed. 923. $800 allowed as salvage of steam barge in peril on Long Island Sound and a derelict; she was worth $3,200, and was saved at some danger to vessel. The Ernest D. Munn (U. S. D. C. D. Conn.), 61 Fed. 694. See The Rescue v. The George B. Roberts (U. S. D. C. E. D. Pa.), 64 Fed. 139. $750 allowed tug and cost of extra coal and oil consumed; steamer was stranded and danger to tug not serious. The I. J. Merriot (U. S. D. C. N. Y.), 106 Fed. 970. $750 allowed; schooner was drifting through Hell Gate; one man boarded her with rowboat and fastened hawser to shore; another looked for owner and tug towed her to dock. The Mary Freeland (U. S. D. E. D. N. Y.), 62 Fed. 943. $650, allowed steamer for towing ship 52 miles; no immediate danger to ship and tugs only 10 to 20 miles distant and ship could navigate. The Beaconsfield (U. S. D. C. D. Ala.), 67 Fed. 144. $350 for towing 100 miles a disabled steamer where salvage service of low order only. The Monticello (U. S. D. C. N. D. Cal.), 81 Fed. 211. $300 and costs allowed tug for getting ferryboat off rocks, other tugs being ready to help. The Joseph Laughlin v. The Jas. Rumsey (U. S. D. C. D. N. Y.), 40 Fed. 909. $300 each to 2 tugs for getting off three-mast schooner which had gone ashore on beach; very little danger to tugs. Congdon v. The Eleanor (U. S. D. C. D. S. C.), 42 Fed. 543. $350 allowed tug for separating vessel after collision and towing her short distance to prevent further damage. The Wallace (U. S. D. C. E. D. N. Y.), 41 Fed. 894. $170 awarded in relieving vessel valued at $1,700, there being no danger and little difficulty. Stone v. The Jewell (U. S. D. C. S. D. Ala.), 41 Fed. 103. $150 allowed as salvage of scows valued at $6,000. Mud Scows (U. S. C. C. A. 2d C.), 14 U. S. App. 398; 12 C. C. A. 359; 64 Fed. 495. $150 as to barge and $30 as to tug allowed for putting them afloat when aground. The Moonlight (U. S. D. C. E. D. N. Y.), 72 Fed. 282. $100 to tug and $50 to captain and crew for pulling vessel off shoal; no danger to tug nor delay to her business. The Dennis Valentine (U. S. D. C. Conn.), 47 Fed. 664. $50 for taking canal boat, which was adrift, back to her slip, other tugs ready to help and no risk. The O. C. De Witt (U. S. D. C. E. D. N. Y.), 59 Fed. 620. $25 each for mooring of barges where tug towing ran aground. The Moonlight (U. S. D. C. E. D. N. Y.), 72 Fed. 282. 70 per cent allowed for salvage of schooner. The William Smith (U. S. D. C. D. N. Y.), 59 Fed. 615. 50 per cent of value of property saved after certain deductions allowed for picking up coal laden schooner. The Agnes Manning (U. S. D. C. E. D. N. Y.), 59 Fed. 481; 50 per cent to New York wrecking company, for salvage of cargo of vessel ashore in South America, is not an unreasonable contract. The Alert (U. S. D. C. S. D. N. Y.), 56 Fed. 721. 40 per cent of the value of the vessel as salvage in addition to the value of the vessel as prize to the captors is too large. U. S. v. Farragut, 22 Wall. (U. S.) 406. 25 per cent of net value of cargo allowed. The El Dorado (U. S. D. C. S. D. Fla.), 50 Fed. 951. 22½ per cent of net value

of vessel and cargo allowed. The Tregurno (U. S. D. C. S. D. Fla.), 50 Fed. 946. 6½ per cent of ship and freight valued at $2,000,000, not excessive. The St. Paul (U. S. C. C. A. 2d C.), 57 U. S. App. 688; 30 C. C. A. 70; 86 Fed. 340. 3½ per cent allowed. The Excelsior, 123 U. S. 40. 1.45 per cent of cargo for salvage of cargo affirmed on appeal. Id. ⅓ of proceeds of property saved allowed. The Felix (U. S. D. C. E. D. Pa.), 62 Fed. 620. ⅓ of specie saved allowed. De Leon v. Leitch (U. S. D. C. E. D. La.), 65 Fed. 1002. ⅓ part of gross value allowed for salvage where vessel found abandoned at sea, by another, bound on a foreign voyage, with a valuable cargo and without supernumerary hands and carried into port, with great risk and exertion on the part of the salvors. The Mary Ford, 3 Dall. (U. S.) 188. ⅓ of value of garbage scows adrift allowed; ⅓ to crew and ⅔ to owners. Scows 3, 16 and 17 (U. S. D. C. D. N. Y.), 50 Fed. 570. ⅓ of the gross proceeds of the sales of goods and merchandise allowed. Stratton v. Jarvis, 8 Pet. (U. S.) 4. ⅓ value of property saved allowed to salvage company. The Kemberly (U. S. D. C. E. D. Va.), 40 Fed. 289. ⅓ part only is allowed, under the act of Congress of March 3, 1800, to a privateer for salvage upon the recapture of a cargo on board a private armed vessel of the United States, although ½ be allowed for the recapture of the vessel. The Adeline, 9 Cr. (U. S.) 244. ⅓ value allowed for towing bark in extreme peril. The Rita (U. S. D. C. S. D. N. Y.), 88 Fed. 523.

Saving from danger by fire: The Blackwall, 10 Wall. (U. S.) 1, $\frac{1}{10}$ part of the value of the property saved allowed to a tug carrying fire engines, and laying beside a burning vessel while the engines, under the management of the fire department of the town worked them and extinguished the fire. The Peru, 99 Fed. 783, $2,500, awarded vessel at wharf. The S. W. Schuyler (U. S. D. C. E. D. Pa.), 91 Fed. 1007, $225 allowed; vessel at wharf. The Roman Prince (U. S. D. C. S. D. N. Y.), 88 Fed. 336, large award will not be made tug where vessel at wharf and city fire department arrived soon. The Brandywine (U. S. C. C. A. 4th C.), 50 U. S. App. 16; 16 C. C. A. 187; 87 Fed. 652, ⅓ value of vessel should not be made in view of aid from others, etc. The Dayton (U. S. D. C. E. D. N. Y.), 84 Fed. 678, $2,000 awarded 16 tugs. The Arkansas (U. S. D. C. D. N. J.), 84 Fed. 361, $1,000 to 7 tugs. The H. E. Runnels (U. S. C. C. A. 6th C.), 54 U. S. App. 245; 27 C. C. A. 183; 82 Fed. 755, $2,450 to a steam barge doing a greater part of the work. The O. C. Hanchett (U. S. C. C. A. 2d C.), 45 U. S. App. 761; 22 C. C. A. 678; 76 Fed. 1003, $500 allowed for turning vessel out from burning pier. The Elmbank (U. S. C. C. A. 9th C.), 29 U. S. App. 718; 16 C. C. A. 164; 69 Fed. 104, $10,000 allowed a chemist for extinguishing fire in cargo of sulphur, reduced to $6,000, he being assisted by others; *S. C.*, 62 Fed. 306. The Merjulio (U. S. D. C. S. D. N. Y.), 68 Fed. 935, $2,100 allowed for pumping water into steamer and putting out fire in bunker. Alexander v. Car Floats (U. S. D. C. S. D. N. Y.), 64 Fed. 887, $2,000 awarded 6 tugs, the first on the ground being given the largest award. The Rita (U. S. C. C. A. 5th C.), 10 C. C. A. 629; 62 Fed. 761, $1,500 to tug where no extraordinary risk. The Elena (U. S. D. C. E. D. Pa.), 61 Fed. 519, $6,800 to owner of

5 tugs, in saving vessel loaded with refined petroleum from fire. The City of Atlanta (U. S. D. C. S. D. N. Y.), 56 Fed. 252, $4,000 awarded 21 tugs. The Helen F. Robbins (U. S. D. C. E. D. N. Y.), 55 Fed. 1014, larger sum will be given tugs by whose exertions the vessel was first removed to a place where the other tugs could get at her. The Lighter No. 14 (U. S. D. C. S. D. N. Y.), 53 Fed. 143, allowance to tug not reduced because of interruption of services by ill-judged and arbitrary interference of fire department. The Lydia (U. S. D. C. E. D. N. Y.), 49 Fed. 666, $4,000 to several tugs, ship was loaded with petroleum; $25 each was also allowed 4 men who went into cabin with hose. The Bay of Naples (U. S. C. C. A. 2d C.), 1 U. S. App. 47; 1 C. C. A. 81; 48 Fed. 737, salvage to ferryboat reduced one third; $20,000 to tugs reduced to $12,000. The Kaaterskill (U. S. D. C. S. D. N. Y.), 48 Fed. 701, $2,500 awarded ferryboat. Candee v. 68 Bales Cotton (U. S. D. C. S. D. Ala.), 48 Fed. 479, $200 awarded passenger who abandoned his voyage to save bales of cotton thrown overboard from burning vessel. The Rahway (U. S. D. C. E. D. N. Y.), 46 Fed. 809, $2,000 to tug, ½ to owners and ½ to officers and crew; also $500 to tug arriving after others were at work. The Kenilworth (U. S. D. C. N. D. Cal.), 41 Fed. 523, $14,500 allowed to wooden steamboat and 3 tugs. The Carondelet (U. S. D. C. E. D. N. Y.), 36 Fed. 714, $50 allowed tug for towing from fire. The New York (U. S. D. C. E. D. N. Y.), 34 Fed. 922, $2,000 allowed each of 2 tugs for towing from fire steamer valued with cargo at $433,000.

CHAPTER XLII.

LIMITATION OF LIABILITY STATUTES.

§ 1025. Limitation of liability statutes—General statement.
1026. Limitation of liability—Statutes and their construction, purpose and effect.
1027. Limitation of liability statutes—To what and whom applicable.
1028. Limitation of liability statutes—Nonexemption and exemption.
1029. Limitation of liability statutes—Effect as to torts against other property or persons—Collisions.
1030. Limited liability statute as affecting right of parties to contract.
1031. Limitation of liability statutes—Privity or knowledge.
1032. Limited liability statutes—Time when value of owner's interest to be taken.
1033. Limited liability statutes—How availed of—Procedure.
1034. Limitation of liability statutes—Damages or amount recoverable.

§ 1025. Limitation of liability statutes—General statement.—We have in an earlier chapter[1] given some consideration to the acts of Congress limiting the liability of owners of vessels, and the application thereof to personal injuries and death caused by negligence, etc. We shall in this chapter consider, therefore, statutes limiting liability of shipowners, etc., and their application to loss of property and relief from liability for damages within the terms of such enactments.

§ 1026. Limitation of liability—Statutes and their construction, purpose and effect.—The Harter Act[2] exempts the

[1] Chap. XXXIX.

[2] Act of Congress, Feb. 19, 1893, ch. 105; 27 Stat. 445, 446. See U. S. Rev. Stats. secs. 4281–4289; Act, June 19, 1886, ch. 421; 24 Stat. 80; Act, June 26, 1884, ch. 121, sec. 18; 23 Stat. 57; Act, Feb. 18, 1875, ch. 80; 18 Stat. 320; Act, Feb. 28, 1871, ch. 100; 16 Stat. 458; Act, March 3, 1851, ch. 43; 9 Stat. 635, 636; reproduced, sec. 4282, etc. See also chap. 39, herein. Loss and damage by fire on board ship are within secs. 1 and 3 of Act 1851, 9 Stat. 635; Providence & N. Y. S. S. Co. v. Hill Mfg. Co., 109 U. S. 578. See Butler v. Boston & S. S. Co., 130 U. S. 527, 550; Ex parte Phenix Ins. Co., 118 U. S. 610,

owner, agents or charterer of a ship, transporting merchandise, from liability or loss resulting from "faults or errors in navigation or in the management of the vessel," and certain other designated causes, where said owner has exercised due diligence to make the vessel seaworthy, and also makes it unlawful to stipulate for exemption from the obligation to exercise due diligence to make the vessel seaworthy. This act, however, in noway implies that because the owner is thus exempted when he has been duly diligent, the law has also thereby relieved him from the duty of furnishing a seaworthy vessel.[3] The main purposes of this enactment were to relieve the shipowner from liability for latent defects, not discoverable by the utmost care and diligence, and in the event that he has exercised due diligence to make his vessel seaworthy, to exempt him and the ship from responsibility from damages or loss resulting from faults or errors in navigation or in the management of the vessel; and in determining the effect of this statute in restricting

625; Quinlan v. Pew, 56 Fed. 115. Act of Congress of June 26, 1884, limiting liability did not impliedly repeal U. S. Rev. Stat. sec. 4493, as to liability to passenger for damages. The Annie Faxon (U. S. C. C. A. 9th C.), 44 U. S. App. 591; 21 C. C. A. 366; 75 Fed. 312. See as to U. S. Rev. Stats. secs. 4470, 4491, requiring certain appliances to steamers for the protection of persons and property, Cheboygan Lumber Co. v. Delta Transp. Co. (Mich.), 58 N. W. 630. As to exceptions in favor of passengers under Rev. Stat. sec. 4493, and effect of Rev. Stat. secs. 4283–4289, and Act, June 26, 1884 (1 Supp. Rev. Stat. 440), see The Annie Faxon, 75 Fed. 316, 318, 320; and as to Act, June 26, 1884 (23 Stat. 53, chap. 121, sec. 18), with relation to limited liability act, see Butler v. Boston & S. S. Co. 130 U. S. 527. As to English Merchant Shipping Act, 1867, sec. 9, see The Petree [1893], P. 320. As to English Merchant Shipping Acts, amd't act, 1862, sec. 4; Act, 1889, sec. 3, subs. 1, see The Pilgrim [1895], P. 117; 64 L. J. P. D. & A. N. S. 78. As to English Merchant Shipping Act, 1894, sec. 592, see Acton v. Castle Mail Packets Co. (Q. B.), 73 Law T. R. 158. See further Desty's Ship. & Adm. (ed. 1879) secs. 261, 394.

[3] The Carib Prince, 170 U. S. 655; 42 L. Ed. 1181; 18 Sup. Ct. 753; 30 Chic. Leg. N. 341. See Farr & Bailey Mfg. Co. v. International Nav. Co., 98 Fed. 637–640; The Silvia, 171 U. S. 462, 464; 43 L. Ed. 189; 19 Sup. Ct. 7. As to charterers, see In re Lakeland Trans. Co., 103 Fed. 328. A local custom that shipowners shall be liable in such cases for the negligence of their agents is held to be directly opposed to the Act of March 3, 1851, and not a good custom. Walker v. Transportation Co., 3 Wall. (U. S.) 150. See Dobell v. Rossmore Co. (C. A.), [1895] 2 Q. B. 408; 64 L. J. Q. B. N. S. 77; 73 Law T. R. 74.

the operation of general and well-settled principles, those principles will be treated by the court as still existing, and relief from their operation, afforded by the statute, will be limited to that called for by the statute.[4]

§ 1027. Limitation of liability statutes—To what and whom applicable.—The law of limited liability is part of the maritime law of the United States, and is in force upon the navigable rivers above tide water, and applies to enrolled and licensed vessels, exclusively engaged in commerce upon such a river,[5] or upon the Great Lakes,[6] or to acts done upon the high seas.[7] The statute also applies to owners of foreign as well as of domestic vessels,[8] to barges,[9] insurance companies,[10] and to part owners.[11]

[4] The Irrawady, 171 U. S. 187.

[5] In re Garnett, 141 U. S. 1. See The E. A. Shores, Jr., 73 Fed. 347. The law of limited liability was enacted by Congress as part of the maritime law of the United States, and is coextensive in its operation with the whole territorial domain of that law. Butler v. Boston & S. S. Co., 130 U. S. 527. See as to Great Lakes and liability as to fires under Act of Congress of March 3, 1851 (9 Stat. at L. 635), Moore v. American Transp. Co., 24 How. (U. S.) 1.

[6] Rev. Stat. sec. 4289, applies to vessel used on Great Lakes. Craig v. Continental Ins. Co., 141 U. S. 638.

[7] Statute, 1851 and Rev. Stat. sec. 4282, applies to acts done on the high seas as well as on waters of the United States, except when a collision occurs between two vessels of the same foreign nation, or perhaps of two foreign nations having the same maritime law. The Scotland, 105 U. S. 24.

[8] The Scotland, 105 U. S. 24 (Act, March 3, 1851, ch. 43, and sec. 4282, etc., Rev. Stat.). Enactment extends to foreign vessels bringing cargo to United States. The Etona (U. S. D. C. S. D. N. Y.), 64 Fed. 880. Exemption cannot be limited to vessels transporting merchandise between domestic and foreign ports. The E. A. Shores, Jr. (U. S. D. C. E. D. Wis.), 73 Fed. 342. Foreign vessels included within Harter Act. The Silvia (U. S. C. C. A. 2d C.), 68 Fed. 230, aff'g 64 Fed. 607. Harter Act does not include foreign vessels. The Chattahoochee (U. S. C. C. A. 1st C.), 33 U. S. App. 510; 21 C. C. A. 162; 74 Fed. 899.

[9] Barges employed in any kind of navigation and one used in tow for carrying excursions are within the limitation of liability acts. Re Myers Excursion & Nav. Co. (U. S. D. C. E. D. N. Y.), 57 Fed. 240.

[10] Sec. 4283, Rev. Stat., applies to insurance company, to which, as insurer, a vessel has been abandoned and which was charged with negligence in causing the vessel to be so towed that she sank and became a total loss. Craig v. Continental Ins. Co., 141 U. S. 638. See 1 Gould & Tucker's Notes, U. S. Rev. Stat. pp. 802–805; 2 id. pp. 535, 536.

[11] Warren v. Boyer (U. S. D. C. E. D. Pa.), 74 Fed. 873 (Act of Congress, June 26, 1884).

§ 1028. Limitation of liability statutes—Nonexemption and exemption.—The statute does not protect against loss occasioned by the carriers placing obstructions in waters, without due care and precaution, to guard against accidents,[12] nor against loss to cargo negligently and improperly supported;[13] or caused by defective loading;[14] or improper loading of heavy and light cargo whereby the vessel was capsized;[15] or by the leaky condition of the vessel's boilers, due to the shipowner's negligence;[16] or by insufficiency of the pumps at the commencement of the voyage;[17] or by failure to inspect cement, covering the bottom of an iron vessel, to see if it is free from cracks before sailing with a cargo of sugar, the acid from which will corrode iron.[18] And generally, where the fault is not due to unseaworthiness or negligence of the owners, but to errors of navigation or management, the statute may be availed of, as appears from the appended citations.[19]

[12] Darrall v. Southern P. R. Co., 47 La. Ann. 1455; 17 So. 884.

[13] The Kate (U. S. D. C. S. D. N. Y.), 91 Fed. 679.

[14] The Frey (U. S. D. C. S. D. N. Y.), 92 Fed. 667.

[15] The Colima (U. S. D. C. S. D. N. Y.), 82 Fed. 665.

[16] The George Dumois (U. S. D. C. E. D. N. Y.), 88 Fed. 537.

[17] The Alvena (U. S. D. C. D. N. Y.), 74 Fed. 252.

[18] The Alvena (U. S. C. C. A. 2d C.), 51 U. S. App. 100; 25 C. C. A. 261; 79 Fed. 973.

[19] See further as to exemption and nonexemption from liability under statute, International Nav. Co. v. Farr & Bailey Mfg. Co., 181 U. S. 218; 45 L. Ed. 830; 21 Sup. Ct. 591, aff'g Farr & Bailey Mfg. Co. v. International Nav. Co., 39 C. C. A. 197; 98 Fed. 636; cargo injured by water coming through port holes—shipowner liable. Botany Worsted Mills v. Knott, 179 U. S. 69; 45 L. Ed. 90; 21 Sup. Ct. 310, aff'g Knott v. Botany Worsted Mills, 27 C. C. A. 326; 82 Fed. 471; wool injured by drainage from sugar—negligence in loading or storage of cargo—vessel liable. The Silvia, 171 U. S. 462; 43 L. Ed.—; 19 Sup. Ct. 7; fault or error in navigation or management, neglect to close iron covers of the ports of a ship. The Oneida (U. S. D. C. D. N. Y.), 108 Fed. 886; ship top-heavy from improper loading—shipowner not relieved. The Aggie (U. S. C. C. A. N. Y.), 46 C. C. A. 276; 107 Fed. 300; sugar stowed in fore peak, bolts extending through ship's plates were loose—cargo injured—ship unseaworthy and owners not relieved. The Germanic (U. S. D. C. D. N. Y.), 107 Fed. 294; extraordinary circumstances affecting stability of ship while discharging and negligence in such respect—not exempt. Re Louisville & C. Packet Co. (U. S. D. C. S. D. Ohio), 95 Fed. 996; 41 Ohio L. J. 372; deciding when baggage of passenger has been shipped within the limitation of liability for property shipped; but see The City of

§ 1029. Limitation of liability statutes—Effect as to torts against other property or persons—Collisions.—The Harter Act[20] operates to modify relations previously existing between the vessel and her cargo and relieves a vessel from responsibility for such cargo for loss or damage through fault of navigation or negligent acts of the master and crew where the vessel is properly manned and equipped, but such exemption does not lessen the vessel's liability to other vessels in case of collision by mutual fault.[21] Nor does it apply to torts committed against

Clarksville (U. S. D. C. D. Ind.), 94 Fed. 201; where the wharf boat was destroyed by fire, and in the case in 95 Fed. 996, the wharf boat and vessel were destroyed. The Guadeloupe (U. S. D. C. S. D. N. Y.), 92 Fed. 670; failure to take off hatches in port of distress is error of management, etc. The Sandfield (U. S. C. C. A. 2d C.), 61 U. S. App. 385; 34 C. C. A. 612; 92 Fed. 663, aff'g 79 Fed. 371; unreasonable delay in opening sluices, and consequent failure to discover leak is neglect in management, etc. The British King (U. S. D. C. S. D. N. Y.), 89 Fed. 872, aff'd 92 Fed. 1018; neglect to sound for water in hold is negligence, in management, etc. The Whittieburn (U. S. D. C. S. D. N. Y.), 89 Fed. 526; improper loading, stowing and ballasting, necessitating jettison does not relieve shipowner. Trinidad Ship. & T. Co. v. Frame (U. S. D. C. S. D. N. Y.), 88 Fed. 528; claim of general average against cargo, where vessel strikes on coral reef through owner's fault not within Harter Act. The Rosedale (U. S. D. C. D. N. Y.), 88 Fed. 324; excess of statutory speed is fault in navigation or management. The Mexican Prince (U. S. D. C. D. N. Y.), 82 Fed. 484; crews' failure to test valves in pipes connecting tanks in consequence of which cargo is injured is fault in management, etc. Re Meyer (U. S. D. C. N. D. Cal.), 74 Fed. 881; an additional subsequent deviation to tow disabled vessel, picked up at sea, into another port than the one into which she had been towed, is not within the Harter Act. The E. A. Shores, Jr. (U. S. D. C. E. D. Wis.), 73 Fed. 342; deviation in compass deflecting course does not exclude from Harter Act. The Flamborough (U. S. D. C. S. D. N. Y.), 69 Fed. 470; when inspection of vessel 27 years old is not due diligence.

[20] 27 U. S. Stat. 445, chap. 105.

[21] The Chattahoochee, 173 U. S. 540; 43 L. Ed. 801; 19 Sup. Ct. R. 491, aff'g 33 U. S. App. 510; 21 C. C. A. 162; 74 Fed. 899; The Delaware, 161 U. S. 459; 40 L. Ed. 771; 16 Sup. Ct. 516; The Niagara (U. S. D. C. S. D. N. Y.), 77 Fed. 329; The Berkshire (U. S. D. C. R. I.), 59 Fed. 1007; The Viola (U. S. D. C. S. D. N. Y.), 59 Fed. 632. Examine In re Lakeland Transp. Co. (U. S. D. C. Mich.), 103 Fed. 328; The George W. Roby, id. The Viola (U. S. D. C. S. D. N. Y.), 60 Fed. 296; The Doris Eckhoff (U. S. D. C. S. D. N. Y.), 41 Fed. 156. In case of a collision at sea between W. & N., both vessels being in fault, cross actions were brought and heard together, and one decree was made, being in favor of the owners of W., which was sunk for one half the difference of damage sustained by the

other persons or their property but only to liability to a shipper.[22] Nor are damages to other vessels and their cargo included.[23] But it is also decided that the act of 1851, limiting liability of shipowners, includes collisions as well as injuries to cargo, so that if a collision happens between two vessels at sea, and one of them is in fault without the privity or knowledge of her owners, the latter will only be liable for the amount of their interest in the vessel and her freight then pending; and that amount being paid into court, if insufficient to pay all the damages caused, will be apportioned pro rata amongst the owners of the injured vessel and of the cargoes of both vessels in proportion to their respective losses.[24] Again, under another decision it is determined that the owner is entitled to a limitation of his liability, under the statute of 1851, to the value of his interest in ship and freight, in case of a collision occasioned by the negligence of the officers or hands of one of the vessels, without any neglect, privity or knowledge of her owner, and where said vessel took fire and sank with loss of cargo, and never completed her voyage nor earned any freight, but was afterward raised and repaired, and was then libeled and seized on behalf of the owners of her cargo, and claimed and bonded at her then value by her owner, who filed an answer and a petition for limited liability, and where it also appeared that the owner received certain moneys for insurance of the ship against loss by fire.[25]

§ 1030. Limited liability statute as affecting right of parties to contract.—The proviso, in the act of 1851, allowing

two vessels, that of W. being the greater. This decree was affirmed and both parties appealed. The owners of W. then claimed under the limited liability act entire exoneration from liability, and a decree for half of their damage, without deducting the damage of N. The claim was, however, disallowed, because that enactment can only be applied to the balance decreed to be paid and that was in favor of the owners of W. The North Star, 106 U. S. 17.

[22] Homer Ramsdell Tr. Co. v. Compagnie Gen. Trans. (U. S. C. C. S. D. N. Y.), 63 Fed. 846. See citations in last preceding note.

[23] The Viola (U. S. D. C. S. D. N. Y.), 59 Fed. 632. See citations in second last preceding note.

[24] Norwich Co. v. Wright, 13 Wall. (U. S.) 104.

[25] The City of Norwich, 118 U. S. 468. Examine In re Lakeland Transp. Co. (U. S. D. C. Mich.), 103 Fed. 328; The George W. Roby, id.

parties to make their own contracts in regard to liabilities of the owners, means express contracts.[26] And it is determined that part owners may contract, notwithstanding the statute, so as to become liable for the entire damage to cargo.[27] But the Harter Act prohibits contracts against liability for negligence in loading and stowing the cargo,[28] although it is decided that the bill of lading may provide that owners shall not be accountable for unseaworthiness at the commencement of the voyage, where they have used all reasonable and proper means to make the vessel seaworthy.[29]

§ 1031. Limitation of liability statutes—Privity or knowledge.—Want of privity or knowledge does not cover matters of which the owner ought to have known but is ignorant thereof, through his own negligence.[30] And it is decided that the owner's knowledge must be actual in a measure with reference to some control or authorization in relation to the wrongful matters, or a personal participation in them and not a knowledge arising by legal construction from the relation of principal and agent.[31] So unless defects in a boiler are so patent that an unskilled person could detect them, the privity or knowledge thereof cannot be charged against a corporation, which owns the vessel, so as to prevent the benefit of the limitation of liability act.[32] And it is also determined that the privity or knowledge necessary to preclude the relief must, when the

[26] Walker v. Transportation Co., 3 Wall. (U. S.) 150.

[27] So held in Kerry v. Pacific Marine Co., 121 Cal. 564; 54 Pac. 89, modified 54 Pac. 262.

[28] Knott v. Botany Worsted Mills, 179 U. S. 69; 45 L. Ed. 90; 21 Sup. Ct. 30, aff'g Botany Worsted Mills v. Knott, 27 C. C. A. 326; 82 Fed. 471. See The Etona (U. S. C. C. A. 2d C.), 38 U. S. App. 50; 18 C. C. A. 380; 71 Fed. 895, as to effect of adopting English law under bill of lading and relief under Harter Act. See as to contract of carriage by shipowner being limited to his obligation as carrier and not within Harter Act, The Prussia (U. S. D. C. E. D. N. Y.), 88 Fed. 531.

[29] The Ontario (U. S. D. C. D. N. Y.), 106 Fed. 324. See further Desty's Ship. & Adm. (ed. 1879) sec. 260.

[30] The Republic (U. S. C. C. A. 2d C.), 61 Fed. 109. See as to clause, without privity, etc., (sec. 4283), The North Star, 106 U. S. 17, 29.

[31] The Colima (U. S. D. C. S. D. N. Y.), 82 Fed. 665.

[32] The Annie Faxon (U. S. C. C. A. 9th C.), 44 U. S. App. 591; 21 C. C. A. 366; 75 Fed. 312; 66 Fed. 575.

owner is a corporation, be that of its managing officers.[33] Again, when an owner of a yacht enters for a race, under conditions and rules rendering him liable for all damages for infringing or breaking them, he is liable for collision consequent upon a breach of said rules, even though without his fault or privity, and cannot claim the statutory limitation of liability.[34]

§ 1032. Limited liability statutes—Time when value of owner's interest to be taken.—The point of time at which the amount of value of the owner's interest in ship and freight is to be taken for fixing his liability is the termination of the voyage on which the loss or damage occurs; and if the ship is lost at sea, or the voyage be otherwise broken up before arriving at her port of destination, the voyage is then terminated for the purpose of fixing the owner's liability. Again, such voyage is terminated when the vessel is sunk by a collision and her value at that time is the limit of the owner's liability, notwithstanding the vessel is subsequently raised and repaired and thereby given an increased value.[35]

§ 1033. Limited liability statutes—How availed of—Procedure.—The limitation of liability is applicable to proceedings in rem against the ship as well as to proceedings in personam against the owner; the limitation extends to the owner's property as well as to his person.[36] And limited liability may be claimed, merely by way of defense to an action; or by surrendering the ship or paying her value into court. The latter method is only necessary when the shipowner desires to bring all the creditors claiming damage into concourse for distribution.[37] Again, it has been expressly decided that shipowners may avail themselves of the defense of limited responsibility by answer or plea as well as by the form of proceeding prescribed by the rules of the court, at least so far as to obtain protection

[33] The Republic (U. S. C. C. A. 2d C.), 61 Fed. 109.

[34] The Satanita (C. A.), [1895] P. 248.

[35] The City of Norwich, 118 U. S. 468; The Great Western, 118 U. S. 520; The Scotland, 118 U. S. 507. See as to United States and English rule, The Scotland, 105 U. S. 24.

[36] The City of Norwich, 118 U. S. 468.

[37] The Great Western, 118 U. S. 520; 30 L. Ed. 156; Thommesen v. Whitwill, id.

against the libellants or plaintiffs in the suit. If the owners plead the statute, a decree may be made requiring them to pay into court the limited amount for which they are liable, and distributing said amount pro rata amongst the parties claiming damages. Such a proceeding in a court of admiralty would be an "appropriate proceeding" under the statute. It is not necessary that the shipowners should surrender and transfer the ship in order to claim the benefit of the law. That is only one mode of relief. They may plead their immunity, and if found in or confessing fault, may abide a decree against them for the value of the ship and freight as found by the proofs.[38] And it is also held that the liability of shipowners, under the enactment of 1851, may be discharged by their surrendering and assigning to a trustee, for the benefit of the parties injured, the vessel and freight, although these may have been diminished in value by the collision or other casualty during the voyage. In this respect, the statute has adopted the rule of the maritime law as contradistinguished from that of the English statutes on the same subject, and it seems that if the vessel and freight are totally lost, the owners will be entirely discharged.[39] In admi-

[38] The Scotland, 105 U. S. 24. See Ex parte Phenix Ins. Co., 118 U. S. 610, 624; Ex parte Slayton, 105 U. S. 451, 452.

[39] Norwich Co. v. Wright, 13 Wall. (U. S.) 104; 20 L. Ed. 585 (Rev. Stat. sec. 4284). See The City of Norwich, 118 U. S. 468, 490; The Scotland, 105 U. S. 24, as to United States and English rules. Proceedings in district court of United States, under Act, 1851, 9 Stat. 635, supersede all actions and suits for the same loss or damage in the state or federal courts, upon the matter being properly pleaded therein. Providence & N. S. S. Co. v. Hill Mfg. Co., 109 U. S. 578. See Moran v. Sturgis, 154 U. S. 256, 270; Butler v. Boston & S. S. Co., 130 U. S. 527, 552; Oregon R. R. & N. Co. v. Balfour, 90 Fed 298; The Columbia, 67 Fed. 944; Quinlan v. Pew, 56 Fed. 120. Failure to comply with the inspection law, though not pleaded, may be availed to exclude benefit of limitation of liability. The Annie Faxon (U. S. C. C. A. 9th C.), 44 U. S. App. 591; 21 C. C. A. 366; 75 Fed. 312. As to state court proceedings and stay under Limited Liability Act, see The Mamie, 110 U. S. 742. See Texas & P. R. Co. v. Kuteman, 54 Fed. 551. Steamboat Inspection Act of February 28, 1871 (16 Stat. 440, chap. 100, Rev. Stat. title LII), does not supersede or displace the proceeding for limited liability (Rev. Stat. sec. 4283), in cases arising under its provisions. Butler v. Boston & S. S. Co., 130 U. S. 527. As to proper course of procedure generally, see Norwich Co. v. Wright, 13 Wall. (U. S.) 104.

ralty, rule 54, the freight to be surrendered in such proceedings is "freight for the voyage."[40] And in certain cases both the tug and her tow must both be surrendered,[41] but under other circumstances the tug need not be surrendered.[42] Again, the right to proceed for a limitation of liability is not lost or waived by a surrender of the ship to underwriters.[43] And it is decided that a court of admiralty, where its jurisdiction is invoked in an equitable proceeding to limit liability for a marine tort, has the remedial powers of a court of chancery.[44]

§ 1034. Limitation of liability statutes — Damages or amount recoverable.[45]—It is decided that if a vessel is stranded by negligence and the limitation of liability act is availed of, the damages include costs and charges of cargo, salvage, partial damage to cargo brought into port, the loss of perishable cargo thrown overboard because worthless by reason of the delay, and the difference in market price consequent upon delay.[46] But no freight except what is earned is to be estimated in fixing the amount of the owner's liability,[47] and the liability of the shipowner, under sec. 4283, of the Rev. Stat., for "freight then pending," extends to passage money and to prepaid freight at the port of departure.[48] But freight pending does not, for surrender, include salvage earned, although earnings of the voyage are included, whether arising from carriage of merchandise or of passengers. The value, however, of the vessel after the disaster is held to constitute the owner's interest to be surrendered,[49]

[40] In re La Bourgogne (U. S. D. C. D. N. Y.), 117 Fed. 261 (U. S. Rev. Stat. sec. 4284), "voyage" defined, Id.; "pending freight" construed, Id.

[41] The Columbia (U. S. C. C. A. 9th C.), 44 U. S. App. 326; 19 C. C. A. 436; 73 Fed. 226.

[42] Re Myers Excursion & Nav. Co. (U. S. D. C. E. D. N. Y.), 57 Fed. 240. See note, 7 L. R. A. 55.

[43] The City of Norwich, 118 U. S. 468.

[44] Oregon R. R. & Nav. Co. v. Balfour (U. S. C. C. A. 9th C.), 61 U. S. App. 150; 33 C. C. A. 57; 90 Fed. 295.

[45] See secs. 956 *et seq.* herein as to collision, etc., and damages therefor.

[46] The City of Para (U. S. D. C. S. D. N. Y.), 44 Fed. 689.

[47] The City of Norwich, 118 U. S. 468. See The Battler (U. S. D. C. E. D. Pa.), 58 Fed. 704.

[48] The Main v. Williams, 152 U. S. 122; 14 Sup. Ct. 486; 38 L. Ed. 381. See The E. A. Shore, Jr., 73 Fed. 342.

[49] Re Meyer (U. S. D. C. N. D. Cal.), 74 Fed. 881.

although insurance is no part of the owner's interest in the ship or freight within the statute, and does not enter into the amount for which the owner is liable.[50]

[50] The City of Norwich, 118 U. S. 468; The Great Western, 118 U. S. 520, 525. See O'Brien v. Miller, 168 U. S. 287, 303; Butler v. Boston & S. S. Co., 130 U. S. 527, 558; Northern Trust Co. v. Snyder, 76 Fed. 38. Examine as to shipowner's claim to "benefit of insurance" clause in bill of lading and subrogation, In re Lakeland Transp. Co. (U. S. D. C. Mich.), 103 Fed. 228; The George W. Roby, Id. As to adjustment of damages to cargo, etc., see The Viola (U. S. D. C. S. D. N. Y.), 60 Fed. 296.

TITLE VII.

WRONGS AFFECTING PERSONAL PROPERTY.

CHAPTER XLIII.

WRONGS AFFECTING PERSONAL PROPERTY—GENERALLY.

§ 1035. Trespass.
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§ 1035. Trespass.—The common law provided, in addition to the other remedies hereinafter considered, for wrongs affecting personal property, the remedies of trespass on the case and trespass de bonis asportatis. The former remedy is spoken of by Blackstone as an universal one given for all personal wrongs and injury without force,[1] and the latter is given for the unlawful taking of a man's goods.[2] The damages in these actions, as in other cases of injuries affecting personal property, are deter-

[1] 3 Bl. Com. 123.

[2] 3 Bl. Com. 150, 151.

mined on the basis of a compensation for the actual loss or injury sustained, except where, under the circumstances of the case, exemplary damages may be allowed.

§ 1036. When value recoverable.—In an action of trespass de bonis asportatis, or in an action on the case where the property is totally lost or destroyed, the measure of damages will generally be the market value of the property.[3]

§ 1037. Where no market value.—Where property is destroyed which has no market value, the measure of damages is the value of the same to the owner, based on the actual money loss sustained by him as a result of his being deprived of such property, and not such fanciful price as he may for any reason place upon it.[4] So, in an action for the destruction of household goods and wearing apparel by fire, the measure of damages is the actual value of the property, to be determined from their original cost, extent to which they have been used, and their condition at the time of the loss.[5] In this case it was said: "The household goods and wearing apparel of the plaintiff and his family were destroyed. These had been used, were worn and somewhat out of style. Such property has no recognized market value and recovery must be based on its actual value.[6] To ascertain the actual value, it was proper to take into con-

[3] St. Louis, I. M. & S. R. Co. v. Lyman, 57 Ark. 512; 22 S. W. 170; Evans v. Rudley, 34 Ark. 383; Dorsey v. Manlove, 14 Cal. 553; Colo. Land Co. v. Hartman, 5 Colo. App. 150. 38 Pac. 62; Oviatt v. Pond, 29 Conn. 479; Sullivan v. Linn, 23 Fla. 473; Smith v. Zent, 83 Ind. 86; Ind. Nat. & Illum. Gas Co. v. New Hampshire F. Q. Co. (Ind.), 53 N. E. 485; 1 Repr. 914; Brown v. Allen, 35 Iowa, 306; Schindel v. Schindel, 12 Md. 108: Perkins v. Hackleman, 26 Miss. 41; Harrow v. St. Paul & D. R. Co. (Minn.), 44 N. W. 881; Watt v. Nevada C. R. Co., 23 Nev. 154; 46 Pac. 52; Felton v. Fuller, 35 N. H. 226; Parker v. Wheeler, 8 Wend. (N. Y.) 505; Edwards v. Beebe, 48 Barb. (N. Y.) 106; Kelly v. Archer, 48 Barb. (N. Y.) 68; King v. Orser, 4 Duer (N. Y.), 431; McKnight v. Ratcliff, 44 Pa. St. 156; Wise v. Freshley, 3 McCord (S. C.), 547; Burke v. Louisville & N. R. Co., 7 Heisk. (Penn.) 451; Sweeney v. Port Burwell Harbour, 17 Up. Can. C. P. 574.

[4] Dallas v. Allen (Tex. Civ. App.), 40 S. W. 324. See Mo. Pac. R. Co. v. Colquitt (Tex.), 9 S. W. 603.

[5] McMahon v. Dubuque, 107 Iowa, 62; 77 N. W. 517; 5 Am. Neg. Rep. 147.

[6] Citing Gere v. Ins. Co., 67 Iowa, 272; 23 N. W. 137; Clements v. Ry. Co., 74 Iowa, 442; 38 N. W. 144.

sideration the original cost of the articles, the extent of their use, whether worn or out of date, their condition at the time, and from all these determine what they were fairly worth. The cost alone would not be the correct criterion for the present value, but it would be difficult to estimate the value of such goods except by reference to the former price, in connection with wear, depreciation, change in style and present condition."[7] And in another case it is said, that "wherever there is a well known or fixed market price for any property, the value of which is in controversy, it is proper in establishing the value to prove such market value; but in order to say of a thing that it has a market value, it is necessary that there shall be a market for such commodity; that is, a demand therefor, an ability, from such demand, to sell the same when a sale thereof is desired. Where, therefore, there is no demand for a thing—no ability to sell the same—then it cannot be said to have a market value 'at a time when and at a place where' there is no market for the same. . . . In actions of this kind, where the value of the properties destroyed is the criterion of the amount of damage to be awarded, and the property destroyed has no market value at the place of its destruction, then all such pertinent facts and circumstances are admissible in evidence that tend to establish its real and ordinary value at the time of its destruction; such facts as will furnish the jury, who alone determine the amount, with such pertinent data as will enable them reasonably and intelligently to arrive at a fair valuation; and to this end the original cost of the property, the manner in which it has been used, its general condition and quality; the percentage of its depreciation since its purchase or erection, from use, damage, age, decay or otherwise, are all elements of proof proper to be submitted to the jury to aid them in ascertaining its value. And to establish value in such cases the opinions of witnesses acquainted with the standard values of such properties, are properly admissible."[8]

[7] Per Ladd, J., citing Luse v. Jones, 39 N. J. L. 707; Railway Co. v. Nicholson, 61 Tex. 550; Lumber Co. v. Wilmore (Colo. Sup.), 25 Pac. 556; Printz v. People, 42 Mich. 144; 3 N. W. 306; State v. Hathaway, 100 Iowa, 225; 69 N. W. 449; Latham v. Shipley, 86 Iowa, 548; 53 N. W. 342.

[8] Jacksonville, Tampa & K. W. Ry. Co. v. Peninsular Land Transp. & M. Co., 27 Fla. 121, 122; 9 So. 661; 17 L. R. A. 33, 65, per Raney, C. J.,

§ 1038. Where property only injured.—Where it appears that personal property has been injured and not destroyed, the measure of damages is the difference between the value of the property immediately before and after the injury.[9] Thus it has been so held in an action for injuries to a wagon by collision with a car,[10] and where a sleeping car was injured by being run into by a freight train of another road.[11]

§ 1039. Interest.—Interest is generally allowed on the value of the property, from the time of the wrongful or negligent act, as a part of the damages recoverable.[12] But where property is negligently destroyed, it is declared that the allowance of interest is a question for the jury.[13]

§ 1040. Value of use.—Where personal property which has a usable value is injured, the plaintiff may recover as damages the value of its use during the time it is being repaired.[14] But there must be some evidence of the value of such use to per-

citing Sullivan v. Lear, 23 Fla. 463; Lafayette, Bloomington & Miss. R. R. Co. v. Winslow, 66 Ill. 219; 1 Thompson on Trials, sec. 380; Ohio & Miss. R. R. Co. v. Irvin, 27 Ill. 178; White v. Herman, 51 Ill. 243; Penn. & N. Y. R. R. Co. v. Bunnell, 81 Pa. St. 414; Vandine v. Burpee, 13 Met. 288.

[9] Louisville & N. R. Co. v. East Tenn. V. & G. R. Co. (C. C. App. 6th C.), 60 Fed. 993; Kiebs Mfg. Co. v. Brown, 108 Ala. 508; 18 So. 659; Atlantic & W. P. R. Co. v. Hudson, 62 Ga. 679; Monroe v. Latten, 25 Kans. 354; Johnson v. Holyoke, 105 Mass. 80; Hoffman v. Met. St. R. Co., 51 Mo. App. 273; Mo. Pac. R. Co. v. Hannibal & St. J. R. Co., 79 Mo. 478; Street v. Laumier, 34 Mo. 469; Davidson v. Mich. C. R. Co., 49 Mich. 428; Dow v. Winnepesaukee Gas & E. Co. (N. H.), 42 L. R. A. 569; 41 Atl. 288; Johnson v. Parker, 7 Misc. (N. Y.) 685; 58 N. Y. St. R. 332; Fidelity Co. v. Seattle, 16 Wash. 445; 47 Pac. 963.

[10] Hoffman v. Met. St. R. Co., 51 Mo. App. 273. In this case recovery was also allowed for the value of the use.

[11] Louisville & N. R. Co. v. East Tenn. V. & G. R. Co. (C. C. App. 6th C.), 60 Fed. 993.

[12] St. Louis & S. W. R. Co. v. Lyman, 57 Ark. 512; 22 S. W. 170; Oviatt v. Pond, 29 Conn. 479; Union Pac. R. Co. v. Ray, 46 Neb. 750; 65 N. W. 773; Parker v. Wheeler, 8 Wend. (N. Y.) 505; City of Allegheny v. Campbell, 107 Pa. St. 533. But see Chic. & A. R. Co. v. Davis, 54 Ill. App. 130; Sonnenfeld Millinery Co. v. Peoples R. Co., 59 Mo. App. 668.

[13] Eddy v. Lafayette (C. C. App. 8th C.), 4 U. S. App. 247; 49 Fed. 807.

[14] Travis v. Pearson, 43 Ill. App. 579; Hoffman v. Met. St. R. Co., 51 Mo. App. 273; Wheeler v. Townsend, 42 Vt. 15.

mit a recovery therefor,[15] and it is not an element to be considered, where the evidence requires the jury to guess and speculate in reference thereto.[16]

§ 1041. Loss of profits.—In an action of trespass, for the taking away of personal property which is used by plaintiff in his business, loss of profits may also be recovered.[17] So in an action for taking away of personal property, including books of account and orders, future profits have been allowed, the jury being permitted to consider profits in the past in estimating the amount.[18] And where there had been a wrongful seizure and removal of, by a city, of property used in the business of a huckster, it was held that there might be a recovery for lost profits.[19] But, for the wrongful seizure of a stock of merchandise, it is improper to instruct the jury that there may be a recovery of profits up to the time of the trial, where business was resumed by the plaintiff shortly after the seizure,[20] and where advertising boards had been cut down, it was held that there could be no recovery for future rents and profits, where, though the boards could have been immediately replaced, no effort was made to replace them.[21]

§ 1042. Consequential and remote damages—Generally.—In an action for injury to or destruction of personal property, there cannot be a recovery for damages which are not the natural and proximate result of the act complained of.[22] Nor

[15] Hoffman v. Met. St. R. Co., 51 Mo. App. 273.

[16] Volkmar v. Third Ave. R. Co. (App. Div. N. Y.), 58 N. Y. Supp. 1021; 28 Misc. 141, rev'g 27 Misc. 818; 57 N. Y. Supp. 1149.

[17] For such recovery in other actions, see various sections in this work.

[18] Oliver v. Perkins, 92 Mich. 304; 52 N. W. 609.

[19] Antonio v. Royal (Tex.), 16 S. W. 1101.

[20] Cunningham v. Sugar, 9 N. M. 105; 49 Pac. 910; 15 Nat. Corp. Rep. 430, citing Smith v. Bolles, 132 U. S. 129; 33 L. Ed. 281; Crymble v. Mulvaney, 21 Colo. 203; Anderson v. Sloane, 72 Wis. 566.

[21] Ludlow v. Steffen, 19 Ky. Law Rep. 1671; 44 S. W. 119.

[22] Newell v. Smith, 28 Misc. (N. Y.) 182; 58 N. Y. Supp. 1025, wherein it was held that the wages of a driver and the cost of keeping a horse during the period required for the repair of a wagon, which had been injured, were not recoverable in an action for injury to the wagon, where neither the driver nor horse was injured.

is compensation for conjectural consequences based on conjectural value allowable.[23] So, in an action for the loss of a team, damages should not include loss of time sustained by the owner.[24] And damages to a florist, for injury to plants, should not include an allowance for injury to business reputation, resulting from a sale of damaged plants, such an element being too remote and conjectural.[25]

§ 1043. Consequential damages—Jurisdiction of court of claims—Indian depredations.—The jurisdiction conferred by act of Congress of 1891, upon the court of claims, in cases where property has been taken or destroyed by Indians, does not extend to those cases of consequential damages, where property is merely diminished in value as a result of other property, necessary to transport it to market, being destroyed.[26]

§ 1044. Nominal damages.—If a trespasser returns the property uninjured to the owner, the latter will be limited in his recovery to nominal damages.[27] But the fact that there was only a brief detention of the property will not so limit the damages, where such property has an usable value.[28] And a verdict for only nominal damages will not be sustained, where it appears from the evidence that plaintiff is entitled, if to any damages, to a substantial sum for the loss of the use of the property and the cost of repairs.[29]

§ 1045. Exemplary damages.—An owner of personal property may, in an action of trespass against the wrongdoer, recover exemplary damages, where it appears that the latter acted with a wanton, reckless or wilful disregard of the rights of the plaintiff.[30] So such damages may be allowed for the taking and con-

[23] Watt v. Nevada C. R. Co., 23 Nev. 154; 46 Pac. 52.

[24] Churchman v. Kansas City, 44 Mo. App. 665.

[25] Dow v. Winnepesaukee Gas & E. Co. (N. H.), 41 Atl. 288; 42 L. R. A. 569.

[26] Price v. United States, 174 U. S. 373; 43 L. Ed. 1011; 19 Sup. Ct. R. 765, aff'g 33 Ct. Cl. 106.

[27] Gens v. Hargadine, 45 Mo. App. 38.

[28] Gardner v. Baer, 26 Misc. (N. Y.) 181; 56 N. Y. Supp. 1096.

[29] Kerr v. Union Ry. Co., 20 Misc. (N. Y.) 171; 45 N. Y. Supp. 819.

[30] Plumb v. Ives, 39 Conn. 121; Farwell v. Warren, 51 Ill. 467; Briscoe v. McElween, 43 Miss. 556; Engle v. Jones, 51 Mo. 316; Wort v. Jen-

verting of animals under such circumstances;[31] and against a landlord for the unlawful distress of the tenant's property.[32] So they are recoverable for the wanton and malicious beating of an animal.[33]

§ 1046. Libelous picture — Property condemned.—In an action of trespass for the destruction of a picture, if the defendant plead that it was a scandalous libel upon individuals, and that being publicly exhibited, he cut it to pieces by way of abating a nuisance, the plaintiff's recovery, where such plea is sustained, will be limited to not more than the value of the materials of which it was composed, the picture in such case not being considered of value as a work of art.[34] And it is decided in an early English case that in an action for taking goods, defendant may prove that they were condemned in a regular way under the statute, for the purpose of showing no property in the defendant in such goods.[35]

§ 1047. Detention of property for appraisement — Customs.—Where there is a controversy as to the amount of duties which are payable upon an importation and property is detained, pending its appraisement, the importer is not entitled to recover for injury to the merchandise, due to leakage during the period of such detention.[36]

§ 1048. Mutilation of dead body.—A wife may recover damages for the unlawful mutilation of the dead body of her husband, and in such a case there may also be a recovery by her for injury to the feelings and mental suffering which directly and proximately result therefrom.[37] Upon this general question,

kins, 14 Johns. (N. Y.) 352; Ratcliff v. Huntley, 5 Ired. (N. C.) 545.

[31] Engle v. Jones, 51 Mo. 316.

[32] Briscoe v. McElwean, 43 Miss. 556.

[33] Wort v. Jenkins, 14 Johns. (N. Y.) 352.

[34] Du Bost v. Beresford, 2 Camp. 511, per Lord Ellenborough. See Boucher v. Shewan, 14 Up. Can. C. P. 420, where a similar doctrine was affirmed in the case of illegal pamphlets or book.

[35] Davis v. Nest, 6 Car. & P. 167. Trespass for breaking and entering plaintiff's house and taking away goods.

[36] Belcher v. Linn, 24 How. (U. S.) 508.

[37] Larson v. Chase, 47 Minn. 307; 50 N. W. 238; 14 L. R. A. 80. In Meagher v. Driscoll, 99 Mass. 281,

and also as bearing upon the question of property in a dead body, the following quotation from a recent opinion is noted: "All courts now concur in holding that the right to the possession of a dead body, for the purpose of decent burial, belongs to those most intimately and closely connected with the deceased by domestic ties, and that this is a right which the law will recognize and protect. . . . Whatever may have been the rule in England under the ecclesiastical law, and while it may be true still that a dead body is not property in the common commercial sense of that term, yet in this country it is, so far as we know, universally held that those who are entitled to the possession and custody of it, for purposes of decent burial, have certain legal rights to and in it which the law recognizes and will protect. Indeed, the mere fact, that a person has exclusive rights over the body for the purposes of burial leads necessarily to the conclusion that it is his property in the broadest and most general sense of that term, viz, something over which the law affords him exclusive control. But this whole subject is only obscured and confused by discussing the question whether a corpse is property in the ordinary commercial sense, or whether it has any value as an article of traffic. The important fact is, that the custodian of it has a legal right to its possession for the purpose of preservation and burial, and that any interference with that right, by mutilating or otherwise disturbing the body, is an actionable wrong. And we think it may be safely laid down as a general rule that an injury to any right recognized and protected by the common law will, if the direct and proximate consequence of an actionable wrong, be a subject for compensation. It is also elementary that while the law as a general rule only gives compensation for actual injury, yet whenever the breach of a contract or the invasion of a legal right is estab-

recovery for mental anguish was allowed for the digging up and removal of the body of a child, but the court in this case declared there could be no property in a body and based the recovery on the trespass to plaintiff's land. See also Bessemer Land & I. Co. v. Jenkins, 111 Ala. 135; 18 So. 565; Pulsifer v. Douglass, 94 Me. 556; 48 Atl. 118. In Wright v. Hollywood, 112 Ga. 884; 52 L. R. A. 621; 38 S. E. 94, it was held that interference by cemetery authorities with the right of burial was a tort, and that recovery might be had for violation of the legal right.

lished, the law infers some damage, and if no evidence is given of any particular amount of loss, it declares the right by awarding nominal damages. Hence the complaint stated a cause of action for at least nominal damages. We think it states more. . . . Wherever the act complained of constitutes a violation of some legal right of the plaintiff, which always in contemplation of law causes injury, he is entitled to recover all damages which are the natural and proximate consequence of the wrongful act. That mental suffering and injury to the feelings would be ordinarily the natural and proximate result of knowledge that the remains of a deceased husband had been mutilated is too plain to admit of argument."[38]

§ 1049. Removal by city of electric lighting appliances from streets.—In a recent case in Indiana, the question was considered by the court as to the measure of damages recoverable, in an action against a city marshal, for the wrongful removal from the streets of electric lighting appliances belonging to plaintiff, the removal being made under an order of the city council. On the trial of the case the jury were instructed that they might consider the destruction of plaintiffs' business, the loss of the power house held under a lease, which was conditioned to last only while the house was used for such business, and the difference between the value of the street appliances as standing and as torn down. Under these instructions a verdict of four thousand dollars was rendered which, on appeal, was held excessive on the ground that the order being one which the city was legally authorized to make the recovery should be limited to such damages as resulted from the abuse by the marshal of the order of removal, and the plaintiff could therefore only recover the difference between the value of the appliances as actually removed and the value if they had been properly removed.[39]

§ 1050. Defective bridge.—Where, as a result of a bridge being defective, property which is being conveyed over the same

[38] Per Mitchell, J., in Larson v. Chase, 47 Minn. 307; 50 N. W. 238; 14 L. R. A. 85.

[39] Coverdale v. Edwards, 155 Ind. 374; 58 N. E. 495.

breaks through, and is injured or destroyed, it has been decided in South Carolina that neither under the common law, nor under the statute of that state,[40] can the plaintiff recover for his loss of time or loss of time of his employees, paid by him under contract.[41]

§ 1051. Meat condemned—Full compensation—English Public Health Act.—Under the English Public Health Act,[42] providing for "full compensation" to the owner of meat condemned and destroyed as unwholesome, if, in arbitration proceedings, it is decided that the meat was in fact sound, he is entitled to recover, in addition to the value of such meat, the cost to which he was put in opposing a summons which was taken out against him at the time the meat was seized.[43]

§ 1052. Evidence as to value—Opinions.—In an action for injury to, or destruction of personal property, the opinion of a witness as to its value is admissible, where it appears that he is possessed of sufficient knowledge to form an intelligent opinion in reference thereto, and in the absence of evidence showing this it is inadmissible.[44] So it has been decided that, where the property destroyed has no market value, witnesses who bought and used such property in their business and whose judgment is based on their practical knowledge in reference thereto, the cost of the property originally, the use to which it has been subjected, and its condition at time destroyed, may testify as to its value.[45] In this connection, it has been decided that the opinion of plaintiff's driver is admissible as to the difference in value of the vehicle before and after the collision.[46] And where it appeared that the witness was a pianist, experienced in the use of pianos, and had been requested to and did select the piano at the time of its purchase, he was held competent to testify as to its value.[47]

[40] S. C. Rev. Stat. sec. 1169.

[41] Pearson v. Spartanburg County, 51 S. C. 480; 29 S. E. 193.

[42] Act, 1875, sec. 308.

[43] Walshaw v. Brighouse (C. A.), [1899] 2 Q. B. 286; L. J. Q. B. N. S. 828.

[44] Stephens v. Gardner Creamery Co., 9 Kan. App.— ; 57 Pac. 1058; Townley v. Oregon R. & N. Co., 33 Oreg. 323; 54 Pac. 150.

[45] Union P. D. & G. R. Co. v. Williams, 3 Colo. App. 526; 34 Pac. 731.

[46] Missouri Pac. R. Co. v. Peay (Tex. Civ. A.), 26 S. W. 768.

[47] Fredericks v. Sault, 19 Ind. App. 604; 49 N. E. 909.

But where property is destroyed, the witness, in testifying as to the quantity and value of the same, should be confined to his individual knowledge and judgment.[48]

§ 1053. Evidence as to value—Generally.—Where the article destroyed was made by the plaintiff, and there is no dealer in such articles who is competent to testify as to its value, such value may be determined by testimony of the plaintiff as to the cost of the materials used in making the same and the value of his labor.[49] And in an action for injury to plants and loss of sales of cut flowers, it is competent, upon the question of damages, to show how many flowers were cut from such plants the previous year.[50] Again, where a machine has been disabled though defendant's negligence, it is proper to admit evidence of the cost of work done out of the shop in consequence thereof, as showing the damages directly resulting from the loss of the use of the machine.[51] So the cost of the property destroyed may be some evidence of its value.[52] But the cost of property several years prior to the injury is not any evidence of its present worth, where no evidence is introduced showing the extent to which it was used or in any other way fixing its present value.[53] And it has been held that damages cannot be estimated upon the basis merely of what was paid for each item of repair to the injured property, it being necessary to also show either the value of such repairs, or that the amounts expended were reasonable or necessary.[54]

§ 1054. Pleading.—Where a complaint does not specify the particular amount of damage as to each injury, it has been decided that a demurrer thereto on the ground of uncertainty and

[48] Atchison, T. & S. F. R. Co. v. Osborn, 58 Kan. 768; 51 Pac. 286.

[49] Union P. D. & G. R. Co. v. Williams, 3 Colo. App. 526; 34 Pac. 731.

[50] Lanfer v. Beynton Furnace Co., 84 Hun (N. Y.), 311; 65 N. Y. St. R. 560; 32 N. Y. Supp. 362.

[51] Jackson v. Architectual Iron Works, 15 Misc. (N. Y.) 93; 71 N. Y. St. R. 830; 36 N. Y. Supp. 808.

[52] Watt v. Nev. Cent. R. R. Co., 23 Nev. 173; 46 Pac. 52; Luse v. Jones, 39 N. J. L. 707.

[53] Chic. M. & St. P. R. Co. v. Tompkins, 90 Fed. 363; 12 Am. & Eng. R. Cas. N. S. 70.

[54] Volkmar v. Third Ave. R. Co., 28 Misc. (N. Y.) 141; 58 N. Y. Supp. 1021, rev'g 27 Misc. 818; 57 N. Y. Supp. 1149.

ambiguity is improperly overruled.[55] And, in an action for the wrongful sequestration of household goods, it has been decided that a cause of actual damages is not stated by an allegation that, in consequence of such act the plaintiffs were compelled to sleep without the necessary beds and beddings, in the absence of some allegation of damages proximately resulting therefrom.[56]

§ 1055. Suit to enjoin seizure and recover damages—Judgment silent as to latter—Effect.—Where the judgment, in an action to enjoin the seizure of property and recover damages, grants the injunction but is silent in reference to the damages, a plea of res judicata in a subsequent suit for damages will be sustained, the judgment in the former suit being considered as equivalent to a rejection of such a claim.[57]

§ 1056. Wrongful distress.—In an action for wrongful distress, by a landlord of a tenant's goods, there may be a recovery by the latter of such damages as will compensate him for the injury sustained as the natural result of the wrongful act.[58] And special damages for loss suffered by the interruption of business are also recoverable.[59] The damages which are recoverable for the goods taken should be estimated on the basis of the fair market value of such goods at the time of the taking, with interest,[60] and not the amount they sell for.[61] The plaintiff cannot, however, in such an action, recover damages on account of a foreclosure of a chattel mortgage upon the property resulting from the wrongful distress.[62] And, generally, the recovery will be limited to compensatory damages, exem-

[55] Foerst v. Kelso, 131 Cal. 376; 63 Pac. 681. But see McFarland v. Roby, 4 Ohio Dec. 211; 1 Clev. Law Rep. 118.

[56] Carson v. Texas Installment Co. (Tex. Civ. App.), 34 S. W. 762.

[57] Spencer v. Banister, 12 La. Ann. 766.

[58] Briscoe v. McElween, 43 Miss. 556; Mickle's Admr. v. Miles, 1 Grand. Cas. (Pa.) 320; Harvey v. Pollock, 11 M. & W. 740.

[59] Sherman v. Dutch, 16 Ill. 283, wherein it was held that the plaintiff, being obliged to suspend publication of his newspaper, special damages from loss of patronage were recoverable if pleaded.

[60] Perrin v. Wells, 155 Pa. St. 299; 26 Atl. 543. See Texas & P. Coal Co. v. Lawson (Tex. Civ. App.), 31 S. W. 843.

[61] Easterly Mach. Co. v. Spencer (Pa. Com. Pl.), 28 Wkly. Notes Cas. 287.

[62] Gilmore v. Fries, 34 Ill. App. 137.

plary damages not being recoverable, in the absence of evidence showing fraud, malice, oppression or wilful wrong, either in the taking or detention.[63] In some states double damages have been authorized by statute for the wrongful distress of goods.[64] But it has been held in Kentucky, in an action under the statute of that state to recover double damages,[65] that in such cases the petition must either recite the statute or conclude to the damage of the plaintiff contrary to the form of the statute.[66]

§ 1057. Interruption of business—Negligent blasting.—Where, as a result of the negligent and careless acts of a person in blasting, workmen, employed by another, leave the building in which they are at work under a reasonable and well-grounded apprehension of immediate danger to life and limb, the latter may, in an action for interruption of his business, recover as damages the value to him of the work which the defendant's negligence prevented from being done.[67] In the case cited for this rule, it was said: "This suit is not an action of trespass quare clausum fregit, but in the nature of a special action on the case. The court therefore properly ruled that the adjustment of the damages to the real estate was no bar to the action, it being understood by both parties that the damage by interruption of plaintiff's business was not included in the settlement. The plaintiff's workmen were driven from the building by a reasonable and well-founded apprehension of immediate danger to life and limb from an act which the defendant was about to commit in a careless and improper manner. The damage to the plaintiffs so occasioned was the natural result, and not a mere remote consequence of the defendant's want of care."[68]

[63] Briscoe v. McElween, 43 Miss. 556; White v. Stribling, 71 Tex. 108; Fishburne v. Engledore, 91 Va. 548; 22 S. E. 354.

[64] Smith v. Downing, 6 Ind. 374; Ind. Rev. St. 1843, ch. 45, secs. 217, 220; Fry v. Breckinridge, 46 Ky. 31; Mitchell v. Franklin, 3 J. J. Marsh. (Ky.) 477; Ky. Act, 1811 and 1748; Hawkins v. James, 69 Miss. 361; 11 So. 654; Miss. Code, 1880, sec. 1311; Quinnett v. Washington, 10 Mo. 53; Mo. Act, Feb. 25, 1843, secs. 7, 9; Hartshorn v. Kierman, 7 N. J. L. 29; N. J. Rev. Laws, p. 202; Royse v. May, 93 Pa. 454; Pa. Act, May 10, 1871.

[65] Ky. Stat. sec. 2312.

[66] Garnett v. Jennings, 19 Ky. Law Rep. 1712; 44 S. W. 382.

[67] Hunter v. Fauen, 127 Mass. 481; 34 Am. Rep. 423.

[68] Per Ames, J.

CHAPTER XLIV.

ANIMALS.

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§ 1058. Where animals are killed.—Where animals are killed, owing to the negligence of a person, there may be a recovery of damages by the owner for the loss which he has sustained. This class of injuries most frequently is caused by railroad trains, and is in many states expressly provided for by statute. The measure of damages in such cases is generally the value of the animal at the time of killing,[1] to which the courts,

[1] Alabama Great So. R. Co. v. McAlpin, 75 Ala. 113; St. Louis, I. M. & S. Ry. Co. v. Biggs, 50 Ark. 169; 6 S. W. 724; Jacksonville, T. & K. Ry. Co. v. Wellman, 26 Fla. 344; 7 So. 845; Toledo, Peoria & W. Ry. Co. v. Arnold, 43 Ill. 418; Cincinnati, H. & I. R. R. Co. v. Jones, 111 Ind. 259; 12 N. E. 113; Central Branch, U. P. E. Co. v. Nichols, 24 Kan. 242;

as a general rule, add interest on the value from such time.[2] The value is ordinarily fixed at that of the time and place of killing and not at the general market value of such animals,[3] unless they have no market value at such place, in which case it may be fixed at the value at the nearest market.[4] The rule as to the allowance of interest also applies, though the animal may not die until sometime after the date of the injury. So where a horse was injured and subsequently died, it was held improper to charge the jury, that the plaintiff would be entitled to recover "whatever the horse would have made for hire during that time (from the time of his injury to his death)."[5] Again, in determining their value, the business of the persons owning the animals is not to be considered, as a general rule, where recovery is sought for the value only. This rule has been applied in the case of cows killed by a railroad train.[6] In this case it was said, "although the fact that such cows were dairy stock was relevant as to value, the business of plaintiff was not one of the facts to be considered in determining their

Varco v. C. M. & St. P. Ry. Co., 30 Minn. 18; 11 Am. & Eng. R. Cas. 419; 13 N. W. 921; Clenn v. Wabash R. Co., 72 Mo. App. 433; Price v. Barnard, 70 Mo. App. 175; Harris v. Panama R. R. Co., 58 N. Y. 660; San Antonio St. R. Co. v. Wray (Tex. Civ. App.), 37 S. W. 641; Galveston, H. & S. A. R. Co. v. Matula (Tex.), 19 S. W. 376; Burlington v. Newport News & M. V. Co., 32 W. Va. 436; 9 S. E. 876.

[2] Alabama Great So. R. Co. v. McAlpin, 75 Ala. 113; St. Louis, I. M. & S. Ry. Co. v. Biggs, 50 Ark. 169; 6 S. W. 724; Atlanta Cotton Seed Oil Mills v. Coffey, 80 Ga. 145; 4 S. E. 759; 12 Am. St. Rep. 244; Varco v. C. M. & St. P. Ry. Co., 30 Minn. 18; 13 N. W. 921; 11 Am. & Eng. R. Cas. 419; San Antonio St. R. Co. v. Wray (Tex. Civ. App.), 37 S. W. 641. But see Toledo R. Co. v. Johnson, 74 Ill. 83. "The basis of plaintiff's claim for compensation is the value of the property destroyed. In such cases, interest is necessarily allowed for the indemnity of the party. The same rule applies as in the conversion of property." Varco v. C. M. & St. P. Ry. Co., 30 Minn. 18; 13 N. W. 921; 11 Am. & Eng. R. Cas. 419, per Vanderburg, J.

[3] Loesch v. Koehler, 144 Ind. 278; 35 L. R. A. 682; 43 N. E. 129, aff'g 41 N. E. 326; Price v. Barnard, 70 Mo. App. 175; Texas & P. R. Co. v. Billingsly (Tex. Civ. App.), 37 S. W. 27.

[4] Texas & P. R. Co. v. McDonnell (Tex. Civ. App.), 27 S. W. 177.

[5] Atlanta Cotton Seed Oil Mills v. Coffey, 80 Ga. 145; 4 S. E. 759; 12 Am. St. Rep. 244. See also Gulf, T. & S. F. R. Co. v. Keith, 74 Tex. 287; 11 S. W. 1117; Page v. Sumter, 53 Wis. 652.

[6] Parrin v. Montana Cent. Ry. Co., 22 Mont. 290; 56 Pac. 315.

value. No attempt was made to plead or prove that damage to his business was suffered by reason of the killing; on the contrary, recovery was sought only for the value of the animals which, under the complaint and evidence, would be the fair or reasonable market value, not their peculiar value to the owner nor what they were worth to him in his business. Plaintiff was entitled to a sum equal to the market value of the cattle and no more."[7] So also in the absence of some evidence as to the value of the animals killed, there can be no recovery therefor.[8]

§ 1059. Where animals are injured only.—Where animals are merely injured, the measure of damages is generally declared to be the difference between the value of the animal before and after the injury.[9] In many cases, however, this would not entirely compensate the owner for the loss he has sustained. It being his duty, in such a case, to endeavor to lessen the loss and it perhaps being necessary to save the life of the animal, that medicines should be obtained, or the services of a veterinary be procured, these expenses are in numerous decisions held to be recoverable. And the weight of authority supports the rule that under such circumstances the measure of damages is the difference between the value of the animal before the injury and after he has been doctored or cured, together with such necessary and reasonable expenses as have been incurred for the purposes above mentioned.[10] In one case in which this question arose in reference to an instruction, it

[7] Per curiam.

[8] Southern Ry. Co. v. Varn, 102 Ga. 764; 29 S. E. 822; 4 Am. Neg. Rep. 35.

[9] St. Louis, I. M. & S. Ry. Co. v. Biggs, 50 Ark. 169; 6 S. W. 724; Denver & R. G. R. Co. v. Nye, 9 Colo. App. 94; 47 Pac. 654; 1 Am. Neg. Rep. 12; Fritz v. New York, N. H. & H. R. R. Co., 62 Conn. 503; 26 Atl. 347; Atlanta Cotton Seed Oil Mills v. Coffey, 80 Ga. 145; 4 S. E. 759; 12 Am. St. R. 244.

[10] Central R. R. & Banking Co. v. Warren, 84 Ga. 329; 10 S. E. 918; Brudi v. Luhrman, 26 Ind. App. 221; 59 N. E. 409; Manwell v. Burlington Cedar Rap. & N. Ry. Co., 80 Iowa, 662; 45 N. W. 568; Gillett v. Western R. R. Corp., 8 Allen (Mass.), 560; Shaw v. Mo. & K. Dairy Co., 56 Mo. App. 521; Pittsburg, C. C. & St. L. R. Co. v. Kelly, 12 Ohio C. C. 341; 1 Ohio C. D. 662; Gulf, Colo. & S. F. Ry. Co. v. Keith, 74 Tex. 287; 11 S. W. 1117; International & G. N. R. Co. v. Cocke, 64 Tex. 151; Hughes v. Quinlan, 8 Car. & P. 703. See St. Louis, I. M. & S. R. Co. v. Biggs, 50 Ark. 169; 6 S. W. 724. But see Rowland v. Baird, 18 Abb. N. C. (N. Y.) 256.

was said: "As we understand the instructions, the jury were told that the plaintiffs were entitled to recover a sum equal to the diminution of the market value of the horses, caused by the injuries; to be ascertained not by their conditions immediately after the occurrence of the accident, but by that in which they were shown to be at or about the time of the trial and after they had been partially restored to health and soundness by restorative means which the plaintiffs had reasonably used in the relief and cure of the injuries which they had received. Thus construed the instructions were clearly right. The plaintiffs were entitled to recover their reasonable expenses incurred in curing the horses, because thereby they had diminished the extent of the injuries and the amount of damages which the defendants would otherwise have been liable to pay. It does not appear that the expenses of curing the animals were unreasonable or that they exceeded in amount the benefit which was thereby done in diminishing the injurious effects caused by the negligence of the defendants."[11] And to this also should be added, where the animal has a usable value to the owner, an allowance for the loss of such use during the period of disability.[12] But, to authorize a recovery of damages for injury to an animal, it has been decided that there should be some other evidence of the damages sustained than a showing of the value of such animal prior to the injury and the price at which he was subsequently sold.[13] And where evidence is given that the animal was of no value subsequent to the injury, the defendant may properly be permitted to show its condition at the time of the trial.[14]

[11] Gillett v. Western R. R. Corp., 8 Allen (Mass), 563, per Bigelow, C. J.

[12] Fritts v. New York & N. E. R. R. Co., 62 Conn. 503; 26 Atl. 347; Pittsburg, C. C. & St. L. R. Co., 12 Ohio C. C. 341; 1 Ohio C. D. 662; Toussaint La Duke v. Township of Exeter, 97 Mich. 450; 56 N. W. 851; 37 Am. St. Rep. 357; Street v. Laumier, 34 Mo. 469; Atlanta & West Point R. R. Co. v. Hudson, 62 Ga. 679. In case of an injury to a horse, the value of its use is not dependent upon whether the owner had other horses to use in its place or not. Fulliam v. Hogens, 83 Iowa, 763; 50 N. W. 215.

[13] Smith v. Kansas City & I. R. T. Co., 60 Mo. App. 591; 1 Mo. App. Repr. 196.

[14] Sahoh v. Town of Greig, 12 N. Y. St. R. 355.

§ 1060. Injury to dogs.—The law recognizes the right of property in dogs and where it appears that a dog, which has been killed or injured, was the property of the plaintiff, he will be entitled to recover at least nominal damages, without proof that the animal was of any pecuniary value whatever, as the injury imports damages.[15]

§ 1061. Consequential and remote damages.—In an action for injuries to a horse, there may be a recovery of damages for rendering him vicious and unsafe as a result of the injuries sustained.[16] So a refusal to charge, that injury to a horse's disposition is too remote and speculative, is proper, where the evidence shows such an injury and that he was not safe to be driven by ladies as before, and that this has diminished his value.[17] And in an action for injuries to cows, there may be an allowance of damages for milk lost while they were recovering from the injuries sustained.[18] But where damages are sought for an injury to a horse, it has been decided that the price paid for a new horse should not be considered as an item of damage, especially where the injured animal fully recovers,[19] though under an allegation of trouble and expense incurred by reason of the injury, it has been declared proper to admit evidence of the amount paid for another horse during the time the injured one was disabled.[20] Again, the value of the use of horses being recoverable for the period of their disability, a hackman, whose team is injured, cannot recover for his prospective earnings.[21] And where oxen, which were used to draw loads of merchandise, were stolen by raiding Indians, it was held that there might be a recovery for the value of the animals but not for consequential damages for deterioration in the value of the merchandise.[22]

[15] Brent v. Kimball, 60 Ill. 211; 14 Am. Rep. 35.

[16] English v. Missouri Pac. R. Co., 78 Mo. App. 232; 1 Mo. App. Repr. 135.

[17] Oliphant v. Beardsley, 54 N. J. L. 521; 24 Atl. 660.

[18] Donahoo v. Scott (Tex. Civ. App.), 30 S. W. 385.

[19] Cady v. Third Ave. R. Co., 60 N. Y. Supp. 269; 29 Misc. R. (N. Y.) 741.

[20] Hoffman v. Ruddiman, 5 Misc. (N. Y.) 326; 55 N. Y. St. R. 214; 25 N. Y. Supp. 508.

[21] Fritts v. New York & N. E. R. Co., 62 Conn. 503; 26 Atl. 347.

[22] Price v. United States, 33 Ct. Cl. 106, aff'd 174 U. S. 373; 19 Sup. Ct. R. 765.

Nor can a person, in an action against another for killing some of his animals, recover for time spent in searching for his other animals, because he feared defendant would also kill them.[23] Nor for the wilful killing and wounding of cattle, can the owner recover for mental anguish suffered by his wife.[24]

§ 1062. Speculative damages—Refusal to charge.—If the proper measure of damages is given in a charge to the jury and they are instructed that speculative damages are not recoverable, a refusal to charge that a particular class of damages is too speculative, is not a ground for a new trial.[25]

§ 1063. Interest—When not recoverable.—Although it may be stated as a general rule that, where animals are killed, there may be a recovery of interest on their value, yet, in some states where the statute expressly provides that where animals are negligently killed by a railway company the jury shall give judgment for the value of the animal or animals killed, it has been decided that, under such a statute, interest cannot be allowed on the value.[26]

§ 1064. Exemplary damages.—An owner of animals, which have been killed or injured, may in some cases recover exemplary damages, where it appears that there were circumstances of aggravation tending to show gross negligence or a wanton and reckless disposition to bring about such injury.[27]

§ 1065. Double damages.—By statute in many states double

[23] Harman v. Callahan (Tex. Civ. App.), 35 S. W. 705.

[24] Donahoo v. Scott (Tex. Civ. App.), 30 S. W. 385.

[25] East Tennessee, V. & G. R. Co. v. Herrman, 92 Ga. 384; 17 S. E. 344.

[26] New York, C. & St. L. R. Co. v. Zumbaugh, 12 Ind. App. 272; 39 N. E. 1058; Ind. Rev. St. 1894, sec. 5316; International & G. N. R. Co. v. Barlow (Tex. Civ. App.), 54 S. W. 797; Galveston, H. & S. A. Ry. Co. v. Vaughan (Tex. Civ. App.), 54 S. W. 1055; Texas & P. Ry. Co. v. Payne (Tex. Civ. App.), 35 S. W. 297; Galveston, H. & S. A. R. Co. v. Donney (Tex. Civ. App.), 28 S. W. 109; Galveston H. & S. A. R. Co. v. Dromgoole (Tex. Civ. App.), 24 S. W. 372; Tex. Rev. St. art. 4245.

[27] Vicksburg & Jackson R. R. Co. v. Patton, 31 Miss. 156; 66 Am. Dec. 552. See Toledo, Peoria & W. Ry. Co. v. Arnold, 43 Ill. 418.

damages may, under certain circumstances, be recovered against railway companies in actions for injuries to animals.[28] In Arkansas it is provided that such damages may be recovered against a railway company for failure of the company to post a notice describing the animals killed.[29] Under this act an owner, who had actual notice of the killing without the posting, is not excepted from the benefit thereof.[30] But to entitle a plaintiff to recover under this statute he must prove that the railroad company failed to give the notice in the manner prescribed.[31] Under the Iowa Code, if the company fails to pay within thirty days after service of notice of damages and claim therefor, double damages may be recovered.[32] Whether the verdict of the jury shall be for the double damages or for single damages which may be doubled by the court, seems not to have been settled, and it has been declared that a verdict will not be reversed because either mode is followed.[33]

§ 1066. Mitigation of damages.—In an action to recover damages for the killing of animals, though the prima facie liability is for the value of the animal at the time of injury, yet if the hide or carcass was of any value or could have been made so by reasonable diligence, the defendant is entitled to a de-

[28] St. Louis S. W. Ry. Co. v. Markham, 66 Ark. 297; 50 S. W. 516; Memphis & Little Rock R. R. Co. v. Carlley, 39 Ark. 246 (Ark. Act, Feb. 3, 1875; Sand. & H. Ark. Dig. sec. 6350); Jones v. Americus, Preston & L. R. R. Co., 80 Ga. 803; 7 S. E. 117 (Ga. Code, secs. 3038, 3041); Shaw v. Chic. R. I. & Pac. Ry. Co., 82 Iowa, 199; 47 N. W. 1004 (Iowa Code, sec. 1289); Maxwell v. Burlington Cedar R. & N. Ry. Co., 80 Iowa, 662; 45 N. W. 568; Van Slyke, v. Chic. St. P. & K. C. Ry. Co., 80 Iowa, 620; 45 N. W. 396; Henderson v. Wabash, St. L. & Pac. Ry. Co., 81 Mo. 605 (Mo. Rev. St. 1879, sec. 809).

[29] Sand. & H. Ark. Dig. sec. 6350; Ark. Act, Feb. 3, 1875.

[30] Memphis & Little Rock R. R. Co. v. Carlley, 39 Ark. 246.

[31] St. Louis S. W. Ry. Co. v. Markham, 66 Ark. 297; 50 S. W. 516, wherein it was held that the time therefor expired at midnight on the last day, and evidence showing that it was not posted at 6:30 P. M. on such day was insufficient, where it was found to be posted a few days after the last day, and the evidence did not show that it was not posted as prescribed.

[32] Iowa Code, secs. 1289, 1976. Such notice may be served by a delivery of the copy instead of the original. Van Slyke v. Chic. St. P. & K. C. Ry. Co., 80 Iowa, 620; 45 S. W. 396.

[33] Memphis & Little Rock R. R. Co. v. Carlley, 39 Ark. 246.

duction therefor.[34] In such cases, where it appears that the animals were of some value either as to the hides or for food purposes, it is the duty of the owner to dispose of them to the best advantage, and if he wantonly abandons them, he ought not to recover their full value.[35] But if the owner does dispose of them to advantage, as the law requires, the full amount realized from the sale or disposition thereof should not be deducted from the value, but there should be a reasonable allowance for the time and trouble required in effecting the sale.[36] Where, however, the person producing the injury takes possession of injured cattle and has them killed and disposed of, there should be no deduction on account of beef or hide value as against the owner.[37] Again, where damages are sought for injuries to an animal, proof of the worthlessness of the animal is admissible in mitigation of damages.[38]

§ 1067. Where owner kills injured animal.—The fact that the owner of an animal, which has been negligently injured, kills it will not prevent a recovery by him of its full value, where it appears that such animal was so badly injured as to be beyond all reasonable hope of recovery.[39]

§ 1068. Duty to lessen damages.—Where an animal is injured, the duty is imposed upon an owner to make a reasonable effort to save its life, but it has been decided that where an animal is killed, no obligation is imposed upon the owner to skin the dead animal or otherwise make use of its carcass in order to lessen the damages.[40] In an Illinois decision, however, it is

[34] Memphis & Charleston R. R. Co., and East Tenn. Va. & Ga. R. R. Co. v. Hembree, 84 Ala. 182; 4 So. 392; Georgia Pac. R. R. Co. v. Fullerton, 79 Ala. 298; Illinois Cent. R. R. Co. v. Finnegan, 21 Ill. 646; Case v. St. Louis & S. F. R. R. Co., 75 Mo. 668; Jackson v. Railroad Co., 73 Mo. 576; Goodwin v. Wilmington & Weldon R. R. Co., 104 N. C. 146; 10 S. E. 136; Roberts v. Richmond & Danville R. R. Co., 88 N. C. 560; Dean v. Chic. & N. W. Ry. Co., 43 Wis. 305.

[35] Illinois Cent. R. R. Co. v. Finnegan, 21 Ill. 645.

[36] Dean v. Chic. & N. W. Ry. Co., 43 Wis. 305.

[37] Clem v. Wabash R. Co., 72 Mo. App. 433.

[38] Dunlap v. Snyder, 17 Barb. (N. Y.) 561.

[39] O'Neil v. East Windsor, 63 Conn. 150; 27 Atl. 237.

[40] Burger v. St. Louis, Keokuk & N. W. Ry. Co., 52 Mo. App. 119. This decision was reversed on other grounds in 123 Mo. 679; 27 S. W. 393.

declared that it is the duty of the owner of animals, which have been killed, to dispose of them to the best advantage where they have some value, and this rule seems just and equitable.[41] In this case it was said: "The proofs show that the cow and steer were both fat and worth, one, ten dollars and the other twenty dollars for beef, and were good for beef, they having only been injured in the legs. We hold under such facts that it was the duty of the owner to have disposed of them to the best advantage, if practicable. He should have made some effort to make them available, and had no right to abandon them wantonly and then claim their full value. The company had a just claim on the owner to do so and thus reduce, as much as possible, the damage and injury. The criterion of damages in this case is the value of the cattle as injured and the value before the injury. If, after the injury, they were as valuable for beef, as the proof shows, as before the injury and the owner wantonly abandoned them, he ought not to recover their value. If one leaves the gate of another open by which some slight injury is done the owner of the gate, the owner has no right to leave it open in order that he may thereby charge the delinquent party for any and all injury he may suffer thereby. He should shut the gate."[42]

§ 1069. Injury in transit—Carriers.—Where animals, while being transported by a carrier, are injured owing to the negligence of the latter, the measure of damages therefor will be the difference between the market value of the cattle in the condition in which they would have arrived but for the carrier's negligence and their market value in the condition in which they arrived, as a result of such negligence.[43] And for the purpose

[41] Illinois Cent. R. R. Co. v. Finnegan, 21 Ill. 645.

[42] Per Breese, J.

[43] New York, L. E. & W. R. Co. v. Estill, 147 U. S. 617; 37 L. Ed. 304, per Mr. Justice Blatchford. See also St. Louis Nat. Stockyards v. Tiblier, 39 Ill. App. 422; McCune v. Burlington C. R. & N. R. Co., 52 Iowa, 600; Cutting v. Grand Trunk Ry. Co., 13 Allen (Mass.), 381; Sturges v. Bissell, 46 N. Y. 462; Black v. Camden & Amboy R. R. Co., 45 Barb. (N. Y.) 40; Gulf, C. & S. F. R. Co. v. Stanley (Tex. Civ. App.), 29 S. W. 806; Missouri Pac. R. Co. v. Edwards, 78 Tex. 307; Missouri Pac. R. Co. v. Fagan, 72 Tex. 127; Mobile & M. R. Co. v. Jurey, 111 U. S. 584; 28 L. Ed. 527.

of showing the condition of the animals so as to enable the jury to better understand the injury inflicted, and to determine the damages at the time and place of delivery, evidence is admissible of the condition of the injured animals up to the time of the trial.[44] In this connection it is said: "The market value of cattle at their destination would depend upon their condition when they reached it. Proof that the deaths subsequently resulted from injuries the cattle had received in the collision would simply show their real condition when they reached their destination. It would not establish any new injury or any additional damage. The plaintiffs were permitted to prove that some of the cattle had been so badly injured at the time of their delivery that they subsequently died from the effect of such injury. There was as to those animals no double assessment of value. The charge of the court clearly pointed out the different items of damage. There is nothing in the record to show that the jury, under the charge, assessed the damages on the view that the value of the animals was depreciated and afterwards allowed for the same animals on the ground that they became totally worthless. The evidence in question tended to show the condition and value of the cattle when they reached their destination."[45] But a witness should not be permitted to give his opinion as to the decrease in value in dollars and cents which have been sustained by cattle as a result of their treatment while in the possession of the carrier.[46] In a New York decision the rule, that where an animal is negligently killed, the measure of damages is the value of the animal at time and place of injury, has been applied where a horse is killed during transportation, owing to the negligence of the carrier.[47] In this case it appeared that a race horse, while being transported from New York to San Francisco, was killed at the Isthmus of Panama, and it was declared that the value was the market value at the latter place, but in the absence of proof showing a market value at such place, proof of such value at some other place was

[44] Estill v. New York, L. E. & W. R. Co., 41 Fed. 853, 856.

[45] New York, L. E. & W. R. Co. v. Estill, 147 U. S. 616; 37 L. Ed. 304, per Mr. Justice Blatchford.

[46] Gulf, C. & S. F. R. Co. v. Hughes (Tex. Civ. App.), 31 S. W. 411.

[47] Harris v. Panama R. R. Co., 58 N. Y. 660; *S. C.*, 4 J. & S. (36 N. Y. Super.) 373.

admissible, in which case the most natural place was that of the destination, it being resorted to, however, only to enable the jury to answer the inquiry as to the value at the place of actual loss, deduction being made for the risk and expense of further transportation.

§ 1070. Where cattle escape from carrier and are killed —Limitation of liability.—Where cattle, while in care of a carrier for the purposes of transportation, escape from one of its cars and are subsequently killed on the tracks of the company by one of its trains, owing to its negligence, in an action independent of the contract and based on the negligence and wrong of the defendant in inflicting the injury, the measure of damages will be the full value of such cattle. Such damages being in nowise connected with or growing out of the contract, the amount thereof will in no way be affected by a stipulation in the contract of affreightment limiting the liability to a specified sum, though such contract may be admissible as furnishing some evidence of an admission on the part of the plaintiff to the effect that such animals were of less value than is claimed in the action.[48]

§ 1071. Injuries causing mares to lose their foals.—Where injuries are inflicted upon mares, which causes them to slink their foals, the measure of damages is not the value of the colts so lost, but rather the reduced value of the mares as a result of such injury.[49] It was said by the court in this case, "The unborn colts could not in the nature of things have had a market value apart from the mares carrying them, and the reduction of the market value of the mares by the premature loss of the colts, constituted the amount of damages."[50] Such an injury may

[48] Louisville & N. R. Co. v. Kelsey, 89 Ala. 287; 7 So. 648; 42 Am. & Eng. R. Cas. 584. "The animals having escaped from the cars and being at large, the rights of the owner in him and to be compensated for injuries done to him through the the wrong and negligence of others were precisely the same as if the contract of shipment . . . had never existed. The measure of damages was the full value of the property destroyed." Per McClellan, J.

[49] Baker v. Mims, 14 Tex. Civ. App. 413; 37 S. W. 190.

[50] Per Stephens, Assoc. Justice, citing New York, L. E. & W. R. Co. v. Estill, 147 U. S. 590; 37 L. Ed. 305; Mo. Pac. R. Co. v. Fagan, 72

happen while animals are in transit in the care of a carrier and owing to the negligence of the latter.[51] In a case in the United States supreme court in which this question arose in an action for injury to heifers, by loss of calves while in transit, it was declared, "If, through the negligence of the defendant, the heifers lost their calves, the difference between their market value if they had arrived in calf and their market value after losing their calves constituted the amount of the plaintiff's damages."[52]

§ 1072. Escape of buck lambs among ewes.—Where ewe lambs, as a result of the escape of buck lambs among them, are gotten with lambs out of season, the measure of damages is the difference between the value of the ewes for breeding and other purposes as they were at, and as they were after, the time of the trespass and not the value of the lambs perishing by reason of the cold and inclement weather when they were dropped.[53]

§ 1073. Communication of contagious diseases.—It is a general rule, in most cases by statute, that an owner of animals, which he knows to be infected with a contagious disease, and who permits them to run at large or to mingle with the animals of another will be liable to the latter unless this latter be guilty of negligence, for all damages occasioned by the communication of such disease to such animals.[54] Every person, however, has the right to use his own property, for the purpose to which such property is usually applied, provided he uses proper care and skill to prevent injury to others, and an owner of cattle may, though he knows them to be diseased, put them into his own lot adjoining the lot of another, occupied by animals, without making him liable for communicating disease, un-

Tex. 127. See also McCune v. Burlington, C. R. & N. R. Co., 52 Iowa, 600.

[51] See cases cited in preceding note.

[52] New York, L. E. & W. R. R. Co. v. Estill, 147 U. S. 617; 37 L. Ed. 305, per Mr. Justice Blatchford.

[53] Stearns v. McGinty, 55 Hun (N. Y.), 101; 28 N. Y. St. R. 637; 8 N. Y. Supp. 216.

[54] Woodrum v. Clay, 33 Fed. 897; Kemmish v. Ball, 30 Fed. 759; Herrick v. Gary, 83 Ill. 85; Mount v. Hunter, 58 Ill. 246; Eaton v. Winnie, 20 Mich. 156; 4 Am. Rep. 377; Clarendon Land I. & A. Co. v. McClelland, 89 Tex. 483; 31 L. R. A. 669; 34 S. W. 98.

less he was negligent in the manner of keeping them.[55] But if one turn diseased animals into a lot, adjoining the lot of another, and it is the former's duty to maintain all or part of the division fence, and such fence is insufficient, he would undoubtedly be liable for all damages sustained by reason of the communication of such disease, in consequence of his animals breaking through such fence and mingling with the other cattle. And in an action of account by an agister for the agistment, it has been decided that if, under such circumstances, it was part of his duty to maintain a division fence and the animals in his care broke through the fence, which was insufficient, and became diseased from contact with other animals, defendant can recoup the damages therefor.[56] And where animals die from a contagious disease, wrongfully communicated by the cattle of another, it is declared that interest is a proper part of the damages to be allowed.[57] The measure of damages in all such cases would be subject to the general rules we have already stated in general cases of injury to animals.[58]

§ 1074. Statute authorizing killing of diseased animals—Actual value.—Where the killing of diseased animals, by order of the board of health, is authorized by statute, providing in such cases for payment by the state to the owner, of the actual value of such animals at the time of their destruction, in pursuance of the statute,[59] the measure of damages thereunder is the actual value of such animals in their diseased condition, and not their value when sound.[60]

§ 1075. Poisoning animals.—The measure of damages which the owner of an animal may recover for negligently poisoning

[55] Fisher v. Clark, 41 Barb. (N. Y.) 329; Clarendon Land I. & A. Co. v. McClelland, 89 Tex. 483; 31 L. R. A. 669; 34 S. W. 98.

[56] Sargent v. Slack, 47 Vt. 674; 19 Am. Rep. 136.

[57] Clarendon Land I. & A. Co. v. McClelland (Tex. Civ. App.), 31 S. W. 1088.

[58] See secs. 1058–1068 herein. As to damages where animals are sold with knowledge of disease which communicates to other animals, see chapter herein on sales of personalty.

[59] See N. Y. Laws, 1893, chap. 661, sec. 63.

[60] Tappen v. State, 146 N. Y. 44; 40 N. E. 499. See also Campbell v. Manchester, 67 N. H. 148; 36 Atl. 877 (N. H. Laws, 1889, chap. 93, secs. 2–4).

the same are to be determined on the basis of a compensation to him for all loss which directly results from the wrong done, and in such a case it has been decided that he may recover the expense of caring for the animal while sick, together with what it will cost him to replace it with another equally as serviceable as the one lost.[61]

§ 1076. Sheep injured by dogs—Statutes as to.—Statutes have in some states been passed providing for recovery where sheep have been injured by dogs. In New Hampshire a statute of this character was passed which provided that in such a case the person suffering such injury might present proof of the nature and extent of his damages to the selectmen of the town, who should draw an order for the amount in his favor upon the town treasurer, and thereupon the town might recover of the owner of the dog the full amount of such order.[62] This act, in so far as it undertook to bind the owner of the dog by the decision of the selectmen fixing the amount of the damage without giving him an opportunity to be heard on the question, was declared to be unconstitutional,[63] but it was also decided that, though unconstitutional in this respect, the town could nevertheless recover the actual damages so sustained in an action against such owner.[64] Under the Connecticut act,[65] it was provided that "such selectmen shall estimate the amount of such damage, and all damage proved to the satisfaction of the selectmen to have been committed in their town shall be paid by such town." In construing the rights of the parties under this statute, it has been determined that the owner of sheep, so injured, is limited in his damages to the estimate made by the selectmen, in the absence of fraud or mistake on their part.[66]

§ 1077. Failure of railway to maintain cattle guards and fences.—If a railroad company in consideration of the grant of a right of way through a person's property agrees to erect and

[61] Seavey v. Dennett, 69 N. H. 479; 45 Atl. 247.

[62] See N. H. Pub. Stat. chap. 118, sec. 9.

[63] East Kingston v. Towle, 48 N. H. 57; 2 Am. Rep. 174.

[64] Unity v. Pike, 68 N. H. 71; 44 Atl. 78; East Kingston v. Towle, 48 N. H. 57; 2 Am. Rep. 174.

[65] Conn. Gen. Stat. sec. 3752.

[66] Van Hoosear v. Wilton, 62 Conn. 106; 25 Atl. 457.

maintain a secure fence or cattle guard and fails to do so and animals, in consequence thereof, enter upon the track and are killed, it is liable therefor, and the measure of damages is the value of the cattle and not the cost of erecting and maintaining the cattle guards.[67] Double damages are in some cases provided for by statute where animals are killed as a result of their straying upon a track which has not been fenced as required, and under such a statute these damages may be recovered where an animal strayed upon a track, where the statute required it to be fenced, though such animal wandered along the track to a public crossing where it was killed.[68] But where under the statute a collision is essential to bring the action within the terms thereof and no actual collision is alleged, as required, it has been held that only single damages can be recovered.[69] Again, in an action for failure to build cattle guards, as required by statute, it has been decided that there may be a recovery for the services of a man and horse in driving the cattle back and keeping them within the enclosure, where plaintiff had a right to expect the speedy building of such guards.[70]

§ 1078. Removal of division fences—Cattle lost.—Where a division fence is unlawfully removed and, as a result thereof, cattle escape and are lost, there may be a recovery for the value of such cattle as immediately escaped and were not recovered after the use of proper diligence, but damages for those that died several months thereafter are too remote, uncertain and speculative to be recoverable, it being largely if not entirely a matter of conjecture and speculation as to what the death rate would have been had the fences not been removed.[71] The court said in this case: "In trying to estimate the extent of death loss which resulted from the cause in question and which would not have resulted from other causes, we find ourselves in the realm

[67] Ohio & M. Ry. Co. v. Hill, 117 Ind. 56; 18 N. E. 459. See also Joliet & Northern Ind. R. R. Co. v. Jones, 20 Ill. 222; Poler v. New York Cent. R. R. Co., 16 N. Y. 476.

[68] Warden v. Mo. K. & T. R. Co., 78 Mo. App. 664; 2 Mo. App. Rep. 345.

[69] Colbert v. Missouri Pac. Ry. Co., 78 Mo. App. 179. See Mo. Rev. Stat. secs. 2611, 2612.

[70] Atchison, T. & S. F. Ry. Co. v. Billings, 7 Kan. App. 399; 52 Pac. 61; 10 Am. & Eng. R. Cas. N. S. 740.

[71] St. Louis Cattle Co. v. Gholson (Tex. Civ. App.), 30 S. W. 269.

of uncertainty and speculation. A property loss which is thus incapable of measurement and which may or may not have resulted from an alleged cause, even upon the most favorable view of the evidence, should not be submitted to a jury as means of estimating the damages."[72]

§ 1079. Evidence—Opinions as to value.—The opinions of witnesses who have dealt, traded in, or raised animals of the particular class to which the injured animal belongs, and in that vicinity, are admissible in evidence upon the question of its value.[73] But the extent of the witness's business and experience or means of knowledge may be developed, on cross-examination, to show the value of his opinion.[74] And though by this means it may appear that a witness who has testified as to the value of such animals in the particular vicinity, and has seen the animal in question, has in fact but little knowledge on the subject, his evidence is not thereby rendered incompetent, but such facts will merely affect the weight to be given thereto.[75] If, however, it appear that the witness is not acquainted with the value, in the vicinity, of such animals, it is declared that he is incompetent to testify as to their value.[76] Nor is the opinion of a witness, based on the evidence, admissible where he is not shown to have heard all the evidence.[77] And again, opinions as to the value of animals to be competent must relate to some standard or marketable value, and where founded upon the mere taste or fancy of the owner or witness, are not competent.[78]

§ 1080. Evidence of owner as to value.—Evidence of the

[72] Per Stephens, J.

[73] Union P. D. & G. R. Co. v. Williams, 3 Colo. App. 526; 34 Pac. 731; Atchison, T. & S. F. R. Co. v. Bartlett, 2 Kan. App. 167; 43 Pac. 284; Parker v. Lake Shore & M. S. R. Co., 93 Mich. 607; 53 N. W. 834; Bowers v. Horan, 93 Mich. 420; 17 L. R. A. 773; 53 N. W. 535; Emerson v. Bigler, 21 Mont. 200; 53 Pac. 621; Gleckler v. Slavens (S. D.), 59 N. W. 323; Missouri, K. & T. R. Co. v. Cocreham (Tex. Civ. App.), 30 S. W. 1118.

[74] Johnson v. Gilmore (S. Dak.), 60 N. W. 1070.

[75] Chic. M. & St. P. R. Co. v. Kendall, 49 Ill. App. 398.

[76] Clark v. Ford, 7 Kan. 332; 51 Pac. 938. But see Holland v. Huston, 20 Mont. 84; 49 Pac. 390. See Warden v. Missouri, K. & T. R. Co., 78 Mo. App. 664; 2 Mo. App. Repr. 345.

[77] Chic. M. & St. P. R. Co. v. Kendall, 49 Ill. App. 398.

[78] Brown v. Hoburger, 52 Barb. (N. Y.) 15.

owner of an animal respecting the value of such animal before and after the injury, for which the action is brought, is admissible, though he is not an expert. Thus it was so held in a late case in Massachusetts where damages were sought for an injury to a horse and buggy.[79] The court said: "The question in this case relates to the admissibility of the testimony of the plaintiff who was the owner, respecting the value of the horse and buggy before and after the accident, without undertaking to decide that in every case the fact of ownership qualifies a party to testify to the value of or damage to property. We think that the evidence was rightly admitted in the present case. It has been held that the owner of real estate was competent to testify to the damage done to his property by the taking of a part of it for a railroad, and also that this opinion regarding the value of his estate was admissible.[80] In Mercer v. Vose,[81] the plaintiff was permitted to testify to the value of the services rendered by him, which were the subject of the suit. In other cases parties sufficiently familiar with the property in controversy to express an opinion upon its value have been allowed to do so, though not regarded as experts.[82] Ordinarily the owner of a horse and buggy may be presumed to have such familiarity with them as to know pretty nearly, if not actually, what they are worth, although he does not buy and sell horses or carriages."[83]

§ 1081. Evidence as to value—Generally.—Where it appears that there is no market value for the class of animals to which the one in question belongs, evidence is admissible as to its value, independent of the market.[84] And evidence of the value of animals, for the particular purpose for which used, may be admitted

[79] Shea v. Hudson, 163 Mass. 43; 42 N. E. 114.

[80] Citing Shattuck v. Stoneham Branch R. R., 6 Allen (Mass.), 115; Snow v. Boston & Me. R. R. Co., 65 Me. 230; Patch v. Boston, 146 Mass. 52, 57; Blaney v. Salem, 160 Mass. 303.

[81] 67 N. Y. 56.

[82] Citing Walker v. Boston, 8 Cush. (Mass.) 279; Shaw v. Charlestown, 2 Gray (Mass.), 107, 109; Haskins v. Hamilton Ins. Co., 5 Gray (Mass.), 432; Whitman v. Boston & Me. R. R. Co., 7 Allen (Mass.), 313; Reed v. Washington Ice Co., 138 Mass. 572, 577.

[83] Per Morton, J.

[84] Galveston, H. & S. A. R. Co. v. Wessendorf (Tex. Civ. App.), 39 S. W. 132.

under an allegation of general damages, where the evidence is of general and not special damages.[85] And the last original return of live stock for taxes, made by the owner, may be admissible on the question of value.[86] So, also, the price paid for an animal is admissible as some evidence of its value.[87] And it is also decided that the price for which the plaintiff has within a short period of time sold similar stock, of as good a strain of blood, is likewise admissible.[88] Again, the pedigree of an animal may, in some cases, be shown for the purpose of determining its value.[89] But such evidence, though admissible for consideration in passing upon evidence of value, is declared to be insufficient to fix the market value of the animal.[90] And where no pedigree is shown, evidence is inadmissible that an animal, if it had the pedigree named, was worth a specified sum.[91]

§ 1082. Same subject continued.—In an action for injury to a horse, evidence of an unsuccessful expenditure of money to develop its speed is not competent to prove value.[92] Nor where cattle are killed by a train, at an unfenced point, is the written notice of value, provided for by statute, competent to show their value in the absence of a statute which so provides.[93] Nor where a statute provides that an appraisement of the value of stock killed by a train, when properly made, shall be prima facie evidence of the value of such stock, admissible where the reports of the appraisement fail to show that it was prop-

[85] Loesch v. Koehler, 144 Ind. 278; 43 N. E. 129.

[86] Southern R. Co. v. Tharp, 104 Ga. 560; 30 S. E. 795; 12 Am. & Eng. R. Cas. N. S. 858.

[87] Akers v. New York, 14 Misc. (N. Y.) 524; 70 N. Y. St. R. 696; 35 N. Y. Supp. 1099; Jacksonville, T. & K. W. R. Co. v. Jones, 34 Fla. 286; 15 So. 924. But in this latter case it is held that where the witness has testified as to the value of cattle, a question on cross-examination as to how much he paid for them is properly ruled out, no reference being made as to place or time.

[88] Home Const. R. Co. v. Church (Ky. Super. Ct.), 14 Ky. L. Rep. 807.

[89] Pacific Exp. Co. v. Lathrop, 20 Tex. Civ. App. 339; 49 S. W. 898.

[90] Richmond & D. R. Co. v. Chandler (Miss. 1893), 13 So. 267.

[91] Union Pac. D. & G. R. Co. v. Perkins, 7 Colo. App. 184; 42 Pac. 1047.

[92] Union Pac. D. & G. R. Co. v. Perkins, 7 Colo. App. 184; 42 Pac. 1047.

[93] Grand Island & W. C. R. Co. v. Swinbank, 51 Neb. 521; 71 N. W. 48 (Neb. Gen. Stat. sec. 202).

erly made.[94] And an offer of compromise by the company is inadmissible against the company over its objection.[95] Again, where the declaration only claims a recovery for the loss of the use of the animals injured, from the time of injury to the commencement of the suit, evidence is not admissible of depreciation in their market value.[96] And under a complaint alleging an accident in which personal injuries were sustained by the plaintiff, and in which his horse was killed and carriage destroyed, but which alleges no damages for the loss of the horse and the carriage, it has been decided that evidence of the value thereof is inadmissible.

§ 1083. Excessive damages.—A verdict for the value of an animal will be set aside as excessive, where it exceeds the value as clearly established by the evidence.[98] But where the evidence in reference thereto is conflicting, a verdict, in excess of some of the estimates of value made by some of the witnesses but less than those of others, will not be disturbed as excessive.[99]

§ 1084. Survival of action.—Under a statute providing that an action for injury done to personal estate shall survive,[100] an action for an injury to a horse and sleigh, by an assault of dogs, will survive the death of the defendant.[1]

[94] Campbell v. Louisville & N. R. Co., 98 Tenn. 148; 38 S. W. 732.

[95] Chic. B. & Q. R. Co. v. Roberts (Colo.), 57 Pac. 1076; 15 Am. & Eng. R. Cas. N. S. 572.

[96] Chic. B. & Q. R. Co. v. Miller, 79 Ill. App. 473.

[97] Freeland v. Brooklyn Heights R. Co., 66 N. Y. Supp. 321; 54 App. Div. (N. Y.) 90.

[98] Jacksonville, T. & K. W. R. Co. v. Garrison, 30 Fla. 431; 11 So. 932.

[99] Riley v. Chic. M. & St. P. R. Co., 104 Iowa, 235; 73 N. W. 488.

[100] Mass. Pub. Stat. ch. 165, sec. 1.

[1] Wilkins v. Wainwright, 173 Mass. 212; 53 N. E. 397.

CHAPTER XLV.

WRONGFUL ATTACHMENT, LEVY AND SEIZURE.

§ 1085. Illegal levy or seizure—Generally.
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§ 1085. Illegal levy or seizure—Generally.—Where it appears that there has been an illegal levy or seizure of personal property, the owner thereof will be entitled to recover, as damages, the value of the property at the time it was seized, with interest thereon, from such time to the time of the trial, and this is generally the measure of damages in the absence of some allegation showing circumstances of aggravation or special damages or facts in mitigation.[1] If, however, the property is re-

[1] Conard v. Pacific Ins. Co., 6 Pet. (U. S.) 162; Stix v. Keith, 85 Ala. 465; 5 So. 184; Summers v. Heard, 66 Ark. 550; 51 S. W. 1057, rev'g on rehearing, 66 Ark. 550; 50 S. W. 78; Norman v. Fife, 61 Ark. 33; 31 S. W. 740; Blass v. Lee, 55 Ark. 329; 18 S. W. 186; Dubois v. Spinks, 114 Cal. 289; 46 Pac. 95; Brasher v. Holtz, 12 Col. 201; Sears v. Lydon (Idaho), 49 Pac. 122; Ruthven v. Beckwith, 84 Iowa, 715; 45 N. W. 1073; Dow v. Julien, 32 Kan. 576; Maynard v. May (Ky.), 25 S. W. 879; Marin v. Satterfield, 41 La. Ann. 742; 6 So. 551; Warren v. Kelley, 80 Me. 512; 15 Atl. 49; Wanamaker v. Bowes, 36 Md. 42; Mitchell v. Stetson, 7 Cush. (Mass.) 435; State Monks v. Bacon, 24 Mo. App. 403; Dorr v. Beck, 76 Hun (N. Y.), 540, aff'd 149 N. Y. 58; Parker v. Conner, 44 N. Y. Supp. 416; Barbee v. Scoggins, 121 N. C. 135; 28 S. E. 259; Sweigert v. Finley, 144 Cal. 266; 22 Atl. 702; Imber v. Northern Market Co. (C. P. Pa.), 14 Lanc. L. Rev. 339; Reeves v. John (Tenn. Ch.), 43 S. W. 134; Lackey v.

turned, the measure of damages in such case is the difference between the value of the property at the time and place it was unlawfully seized and its value at time and place returned.[2] And if the property is returned uninjured, it has been decided that the measure of damages is generally, in the absence of an usable value, the legal rate of interest on its value during the period detained.[3] Where cattle, however, are attached, the difference in value between that at time of taking and time of return, is not in all cases the proper measure of damages, but it has been decided that their condition and value on a day subsequent to their release may be shown, as injuries from the attachment may not have immediately become apparent.[4]

§ 1086. Where goods are manufactured for distant market. —Where goods which are manufactured to be sold in a distant market, where there is a special demand for them, are wrongfully attached, while in the possession of the manufacturer, the latter may recover as damages the price which such goods will bring in that market, less the cost of transportation and selling, though there is no market for the goods where they were attached, and it is declared that the amount of the recovery, in such case, will not be affected by the fact that the one wrongfully

Campbell (Tex. Civ. App.), 54 S. W. 46; Cabell v. Johnston, 13 Tex. Civ. App. 472; 35 S. W. 946; Willis v. Whitsitt, 67 Tex. 673; South Tex. Nat. Bank v. Legrange Oil Mills Co. (Tex. Civ. App.), 40 S. W. 328; Texas Installment Co. v. Lewis (Tex. Civ. App.), 30 S. W. 486. But see Johnston v. Standard Oil Co. (Miss.), 14 So. 533; 4 Cyc. 768, 874.

[2] Bates v. Clark, 95 U. S. 204; Coulson v. Panhandle Nat. Bank, 54 Fed. 855; 21 Wash. L. Rep. 442; Patton v. Garrett, 37 Ark. 605; MacVeagh v. Bailey, 29 Ill. App. 607; Lowenstein v. Monroe, 55 Iowa, 82. See Wilson v. Sullivan, 17 Utah, 341; 53 Pac. 994.

[3] Coulson v. Panhandle Nat. Bank (C. C. App. 5th C.), 54 Fed. 855; 21 Wash. L. Rep. 442; Witascheck v. Glass, 46 Mo. App. 209; Waugh v. Dabney, 12 Tex. Civ. App. 290; 33 S. W. 753; Carson v. Texas Installment Co. (Tex. Civ. App.), 34 S. W. 762; Beveridge v. Welch, 7 Wis. 465. Under a statute authorizing the jury to allow interest "if they think fit" (Mo. Rev. Stat. 1889, sec. 4430), the court should not direct them to allow interest. Hawkins v. Hydraulic Press Brick Co., 63 Mo. App. 64; 1 Mo. App. Rep. 609. If damages are allowed for injury and depreciation, it has been decided that interest should not be allowed. Wilson v. Sullivan, 17 Utah, 341; 53 Pac. 994.

[4] Schofield v. Territory, American Valley Co., 9 N. M. 526; 56 Pac. 306.

attaching them was ignorant that they were manufactured for such purpose.[5]

§ 1087. Nominal damages.—In an action for a wrongful attachment or levy on personal property, though the evidence may not be sufficient to sustain a recovery of actual damages, there may nevertheless be a recovery of nominal damages.[6] And such damages only are recoverable where there has been only a constructive trespass or a merely technical infringement upon the owner's rights with no actual damages resulting therefrom. So where an attachment was procured against some wood, but before the owner heard of it, it was vacated and the wood was never moved thereunder, it was decided that nominal damages only could be recovered.[7] And likewise the recovery will be so limited in the case of a wrongful levy on property in the sheriff's possession under former writs by merely making an endorsement to that effect, where such levy is discharged before anything further is done under it.[8] So also it has been held that such damages only can be recovered where mortgaged property is taken from the mortgagee by virtue of the writ but is sold under and by virtue of the mortgage.[9] And where the property of an officer of a corporation is seized, as that of the corporation's, he will only be allowed nominal damages, where he was appointed keeper of the same, and had control and supervision over it while it was under seizure.[10] And, again for the sale by the sheriff, under an order of court, of goods on attachment as perishable property, only nominal damages should be allowed in an action against him.[11]

§ 1088. Value of use.—In some cases the property levied on

[5] Lathers v. Wyman, 76 Wis. 616; 45 N. W. 669.

[6] Schwartz v. Davis, 90 Iowa, 324; 57 N. W. 849; Scott v. Moll, 45 La. Ann. 1401; Head v. Levy, 52 Neb. 456; 72 N. W. 583; Cent. Nat. Bank v. Gallagher, 163 Pa. St. 456; 30 Atl. 212; Powers-Taylor Drug Co. v. Wafford (Tenn. Ch. App.), 53 S. W. 243; Fourth Nat. Bank v. Crescent Min. Co. (Tenn. Ch. App.), 52 S. W. 1021; Reeves v. John, (Tenn. Ch. App.), 43 S. W. 134; 4 Cyc. 876.

[7] Snell v. Thorp, 16 N. Y. St. R. 84. See 4 Cyc. 876.

[8] Smith v. Johnston, 95 Ala. 482; 11 So. 20.

[9] Schwartz v. Davis, 90 Iowa, 324; 57 N. W. 849.

[10] Scott v. Wall, 45 La. Ann. 1401; 14 So. 301.

[11] Central Nat. Bank v. Gallagher, 163 Pa. 456; 30 Atl. 212.

may have an usable value and where such property is subsequently returned to the owner he may, in an action for its wrongful attachment, recover, in addition to the difference between the value of the property when seized and when returned, the value of the use of the same during the time it is detained.[12] So where mill machinery was wrongfully seized, causing a delay of ten days in putting the machinery in operation, it was held that evidence was admissible to show the value of its use during such delay.[13] But where in such an action the owner was not deprived of the possession of the mill and machinery, but only of some of the personal property, it was decided that, in an action for wrongful attachment covering all of such property, the value of the use and occupation of the mill property was not the correct measure of damages.[14]

§ 1089. Depreciation in value.—If property depreciates in value during the period that it is held under a wrongful attachment, an allowance for such depreciation may be made, in estimating the damages to which the owner is entitled.[15] This rule is applied where a proposed sale of the property is prevented by a wrongful attachment.[16] So where corporate stocks are wrongfully held by attachment and during the period they are so tied up, they depreciate in value, if they could and would have been sold before the depreciation, there may be a recovery for such loss.[17] But where lumber is levied on and during a part of the

[12] Coulson v. Panhandle Nat. Bank (C. C. App. 5th C.), 54 Fed. 855; 21 Wash. L. Rep. 442; Patton v. Ganett, 37 Ark. 605; Hurd v. Barnhart, 53 Cal. 97; MacVeagh v. Bailey, 29 Ill. App. 607; Lowenstein v. Monroe, 55 Iowa, 82; Palmer v. Hightower, 47 La. Ann. 17; 16 So. 560; Halcomb v. Stubblefield, 76 Tex. 310; 13 S. W. 231; Steel v. Metcalf, 4 Tex. Civ. App. 313; 23 S. W. 474; 4 Cyc. 882.

[13] Halcomb v. Stubblefield, 76 Tex. 310; 13 S. W. 231.

[14] Imperial Roller & Milling Co. v. Cleburne First Nat. Bank, 5 Tex. Civ. App. 686; 27 S. W. 49.

[15] Crofford v. Vassar, 95 Ala. 548; 10 S. W. 350; Estes v. Chesney, 54 Ark. 463; 16 S. W. 267; MacVeagh v. Bailey, 29 Ill. App. 606; Chesmore v. Barker, 101 Iowa, 576; 70 N. W. 701; Knapp v. Barnard, 78 Iowa, 347; Sanford v. Willetts, 29 Kan. 647; Fleming v. Bailey, 44 Miss. 132; Fourth Nat. Bank v. Crescent Min. Co. (Tenn. Ch. App.), 52 S. W. 1021; Field v. Munster, 11 Tex. Civ. App. 341; 32 S. W. 417; Anderson v. Sloane, 72 Wis. 566; 40 N. W. 215; 7 Am. St. Rep. 885; Beveridge v. Welch, 7 Wis. 465; 4 Cyc. 880.

[16] Chesmore v. Barker, 101 Iowa, 576; 70 N. W. 701.

[17] Fourth Nat. Bank v. Crescent

time that it is held under the levy, it is permitted to remain piled as it was when seized and as a result thereof depreciates in value, no recovery for such depreciation can be had, where it would have been permitted to remain in such position if no levy had been made.[18]

§ 1090. Loss of profits.—Where the property of a merchant is wrongfully seized under an execution or attachment he may, in an action therefor, recover for loss of the profits which he has sustained as a result of his business being interrupted during the period he was kept out of possession of the same.[19] In this connection it is said in a recent case: "If by reason of the locking up of his store and the attachment of his goods, Cook's business was interrupted and he was thereby deprived of profits which he would have made had not the business been interrupted, this loss of profits was another element of his damages; and if the plaintiffs in error cannot be made to respond to Cook for all the damages which he sustained as a result of this wrongful attachment, it is not because of the fact that under the law Cook is not entitled to these damages, but because of the inability of the courts to formulate any reasonably certain rule for their admeasurement.[20] Counsel for plaintiffs in error criticise somewhat the doctrine of this court making loss of profits in cases like the one at bar an element of damages. We think, however, the doctrine is a just and reasonable one, and one enforced by the courts generally. We think that a loss of profits is a result which may be reasonably, naturally and ordinarily

Min. Co. (Tenn. Ch. App.), 52 S. W. 1021. Compare Girard v. Moore, 86 Tex. 675; 26 S. W. 945, aff'g 24 S. W. 652.

[18] First Nat. Bank (Miss.), 17 So. 736.

[19] Hough v. Dickinson, 58 Mich. 89; 24 N. W. 809; Kyd v. Cook, 56 Neb. 71; 76 N. W. 524; Ebenreiter v. Dahlman, 42 N. Y. Supp. 867; 19 Misc. 9, aff'g 18 Misc. 351; Rheinfeldt v. Dahlman, 42 N. Y. Supp. 465; 18 Misc. 558; Langan v. Potter, 28 N. Y. Supp. 752; 59 N. Y. St. R. 268; 8 Misc. 541. See Blass v. Lee, 55 Ark. 329; 18 S. W. 186; Cunningham v. Sugar, 9 N. M. 105; 49 Pac. 910; 15 Nat. Corp. Rep. 430; Wilson v. Manning (Tex. Civ. App.), 35 S. W. 1079.

[20] Citing Schile v. Brokhaus, 80 N. Y. 614; Goebel v. Hough, 26 Minn. 252; 2 N. W. 846; Shepard v. Milwaukee Gas L. Co., 15 Wis. 349; Schars v. Barud, 27 Neb. 94; Haverly v. Elliott, 39 Neb. 201; Western Union Teleg. Co. v. Wilhelm, 48 Neb. 910.

expected to follow from the closing up of a merchant's place of business and the seizure of his goods; and where an officer holding a writ of attachment directed against A and his property closes up the place of business and seizes the goods in the possession of and claimed to be owned by B, when called upon to make good B's damages, he ought not to complain because the court includes in such damages the loss of profits sustained by B because of the seizure of his goods and the interruption of his business."[21] It has been decided, however, that the recovery should only include the loss of such profits as could not be avoided by the use of all reasonable means at the owner's command.[22] And it has been declared that if the merchandise can be bought at will in the market, the seizure would be merely a temporary interruption of the owner's business, and, as the loss of profits is a special damage, it could only continue so long as the interruption may reasonably continue, as the natural and proximate consequence of the wrongful act, and therefore the damages for loss of profits should be assessed for such reasonable time as, in view of all the surrounding circumstances, would enable the owner to replenish the stock.[23]

§ 1091. Same subject continued.—The owner of a retail store may, where the entire stock of goods has been attached and he excluded from the premises for a designated time, upon proof of the same recover for his loss of profits during such time, and it has been decided that the nature of the loss is made sufficiently certain by proof of the average daily sales at the time of the interruption, and the average profit on such sales.[24] Again, where a merchant was excluded from his business, for a period of three months, evidence was held admissible of sales and profits made by him during the three corresponding months of the previous year.[25] But damages resulting from a loss of

[21] Kyd v. Cook, 56 Neb. 78; 76 N. W. 525, per Ragan, C.

[22] Wilson v. Manning (Tex. Civ. App.), 35 S. W. 1079.

[23] Cunningham v. Sugar, 9 N. M. 105; 49 Pac. 910; 15 Nat. Corp. Rep. 430. See Summers v. Heard, 66 Ark. 550; 51 S. W. 1057.

[24] Langan v. Potter, 8 Misc. (N. Y.) 541; 59 N. Y. St. R. 268; 28 N. Y. Supp. 752. See Ebenreiter v. Dahlman, 19 Misc. (N. Y.) 9; 42 N. Y. Supp. 867, aff'g 18 Misc. 351.

[25] Kyd v. Cook, 56 Neb. 71; 76 N. W. 524.

profits should be alleged in the petition or complaint.[26] And it is held, in Washington, that damages for loss of profits are items of personal injury which cannot be recovered by an assignee in insolvency where occurring before the assignment.[27] And again, it has been decided that loss of profits, from inability to carry out a building contract, are not recoverable, where the ones responsible for the wrongful seizure had no knowledge thereof;[28] nor can there be a recovery for loss of profits which may arise after business is resumed;[29] nor for future loss of profits, they being too remote.[30] And again, where property is kept for use and not for sale, loss of profits from a possible sale thereof are not recoverable.[31]

§ 1092. Injury to business reputation and credit.—The general rule, as sustained by the weight of authority, is that a merchant who, as a result of the wrongful attachment of his property, has sustained a loss of credit may, in an action to recover damages therefor, introduce evidence of such loss, which the jury may properly consider in estimating the damages to which he is entitled.[32] Though such a recovery is not favored

[26] Bradley v. Borin, 53 Kan. 628; 36 Pac. 977.

[27] Slawson v. Schwabacher, 4 Wash. 783; 31 Pac. 329; 31 Am. St. Rep. 948.

[28] McKnight v. Carmichael (Tex. Civ. App.), 27 S. W. 150.

[29] Crymble v. Mulvaney, 21 Colo. 203; 40 Pac. 499.

[30] Casper v. Klippen, 61 Minn. 353; 63 N. W. 737.

[31] Union Nat. Bank v. Cross, 100 Wis. 174; 75 N. W. 992; Braunsdorf v. Fellner, 76 Wis. 1.

[32] Kennedy v. Meacham, 18 Fed. 312; Marx v. Lienkauf, 93 Ala. 453; 9 So. 818; Goldsmith v. Picard, 27 Ala. 142; Lawrence v. Hagerman, 56 Ill. 68; 8 Am. Rep. 674; Zinn v. Rice, 161 Mass. 571; 37 N. E. 747; Brand v. Hinchman, 68 Mich. 590; 36 N. W. 664; State v. Thomas, 19 Mo. 613; Kyd v. Cook, 56 Neb. 71; 76 N. W. 524; Meyer v. Fagan, 34 Neb. 184; 51 N. W. 753; Birch v. Conrow, 161 Pa. St. 118; 28 Atl. 1009; Powers-Taylor Drug Co. v. Wafford (Tenn. Ch. App.), 53 S. W. 243; Lewis v. Taylor (Tex. Civ. App.), 24 S. W. 92; Tynberg v. Cohen (Tex. Civ. App.), 32 S. W. 157; Johnston v. Miller, 31 N. S. 83. But see Crymble v. Mulvaney, 21 Colo. 203; 40 Pac. 499; Lowenstein v. Monroe, 55 Iowa, 82; 7 N. W. 406; Mitchell v. Mattingly, 1 Metc. (Ky.) 237; Cunningham v. Sugar, 9 N. M. 105; 49 Pac. 910; 15 Nat. Corp. Rep. 430; Kaufman v. Armstrong, 74 Tex. 65; 11 S. W. 1048; Union Nat. Bank v. Cross, 100 Wis. 174; 75 N. W. 992; 4 Cyc. 879. In many of these last cited cases it is held that such recovery can only be had where there was malice on the part of the wrongdoer.

in some of the decisions,[33] yet, it would seem that it would be proper to allow therefor, such an allowance being within the general rule of damages to compensate for the loss sustained. Such result can hardly be said to be remote but is rather a natural and direct consequence of the wrongful act of attaching or levying upon the property. If, however, it appears that the defendant was insolvent at the time the wrongful process was sued out against him, the jury might then properly be instructed not to consider loss of credit in estimating the damages.[34] So, also, where the owner of the goods has mortgaged and transferred his property to trustees for the benefit of creditors, it has been decided that there can be no recovery by him, for injury to his credit, as a merchant.[35] Again, it has been held that testimony by a plaintiff, in his own behalf, that he has been injured in his credit to a certain amount, is not admissible since the extent to which he has been injured in this respect is an inferential fact to be determined by weighing all the facts and circumstances and is not a subject of direct proof.[36] And again, though loss of credit should be alleged, it is not necessary to allege the names of those who have refused the plaintiff credit as a result of the wrongful attachment of his property.[37]

§ 1093. Attorney's fees—Costs.—In an action for wrongful attachment or levy on personal property, the rule is followed in most jurisdictions that, in the absence of a statute providing otherwise, attorney's fees either in defending the attachment or prosecuting the claim for damages, are not recoverable as a part of the damages,[38] though, in some of these states, a recovery

[33] See preceding note.

[34] Chaffe v. MacKenzie, 43 La. Ann. 1062; 10 So. 369; Roach v. Brannon, 57 Miss. 490.

[35] Scott Grocer Co. v. Kelley, 14 Tex. Civ. App. 136; 36 S. W. 140.

[36] Trammell v. Ramage, 97 Ala. 666; 11 So. 916.

[37] Kyd v. Cook, 56 Neb. 71; 76 N. W. 524, citing Lawrence v. Hagerman, 56 Ill. 68; 8 Am. Rep. 674.

[38] Kennedy v. Meachan, 18 Fed. 312; Boggan v. Bennett, 102 Ala. 400; 14 So. 742; Patton v. Garrett, 37 Ark. 605; Juchter v. Boehm, 67 Ga. 534; Worthington v. Morris (Ky.), 32 S. W. 269; Jones v. Jones, 48 Md. 391; 30 Am. Rep. 466; Haeussler v. Laclede Bank, 23 Mo. App. 282; Stringfield v. Hirsch, 94 Tenn. 425; 29 S. W. 609; 45 Am. St. Rep. 733; Yarborough v Weaver, 6 Tex. Civ. App. 215; 25 S. W. 468; Strauss v. Dundon (Tex. Civ. App.), 27 S. W. 503; 4 Cyc. 878, 885.

of counsel fees is allowed if it appears that the attachment plaintiff acted in bad faith or maliciously.[39] In many cases, however, it has been decided that the plaintiff in such an action may recover counsel fees, which were necessarily expended by him, to secure a release of the property.[40] Costs, also, in defending an attachment, it is held, are not recoverable in an action for damages.[41] But where, in order to obtain a release of his property, plaintiff is obliged to pay the costs of the attachment, the amount so paid may be considered by the jury in estimating the damages.[42]

§ 1094. Expenses.—Where the property is returned to the owner he may, in an action for damages for the wrongful seizure of the same, be allowed for expenses, incurred by him, in regaining possession of such property.[43] And it has been held that expenses of sending telegrams in response to telegraphic inquiries, for the purpose of preventing injury to credit, are also recoverable.[44] But expenses of attending court and loss of time are not, in themselves, proof of actual injury and should not be considered in estimating the damages.[45] Nor can there be a recovery for time lost and expenses incurred, by the owner of property seized under execution, for the purpose of finding buyers in order to prevent a sacrifice of such property at a forced sale.[46]

[39] Juchter v. Boehm, 67 Ga. 534; Hughes v. Brooks, 36 Tex. 379. See Haeussler v. Laclede Bank, 23 Mo. App. 282.

[40] Roberts v. Heim, 27 Ala. 678; Leay v. Greenwood, 21 Ala. 491; Marshall v. Betner, 17 Ala. 832; Schintker v. Schintker (Iowa), 80 N. W. 403; Byford v. Girton, 90 Iowa, 661; 57 N. W. 588; Whitney v. Brownewell, 71 Iowa, 251; 32 N. W. 285; Ludeling v. Ganet, 50 La. Ann. 134; 23 So. 94; Fush v. Egan, 48 La. Ann. 60; 19 So. 108; Gilkerson Sloss Commission Co. v. Yale, 47 La. Ann. 690; 17 So. 244; Block v. His Creditors, 46 La. Ann. 1334; 16 So. 267; Phelps v. Coggeshall, 13 La. Ann. 440; Roach v. Brannon, 57 Miss. 490; Fry v. Estes, 52 Mo. App. 1; 4 Cyc. 878.

[41] White v. Wyley, 17 Ala. 167; Mitchell v. Mattingly, 1 Metc. (Ky.) 237.

[42] Hunter v. Penland (Tex. Civ. App.), 32 S. W. 421.

[43] Fields v. Williams (Ala.), 8 So. 808; Jones v. Lamon, 92 Ga. 423; Dodson v. Cooper, 37 Kan. 346; Sanford v. Willetts, 29 Kan. 647; Hyde v. Kiehl, 183 Pa. St. 414; 38 Atl. 998.

[44] Johnson v. King, 64 Tex. 226.

[45] Worthington v. Morris, 98 Ky. 54; 32 S. W. 269; Loeb v. Mann, 39 S. C. 465; 18 S. E. 1; Craddock v. Goodwin, 54 Tex. 578. But see Kennedy v. Meacham, 18 Fed. 312.

[46] Fatheree v. Williams, 13 Tex. Civ. App. 430; 35 S. W. 324.

§ 1095. Remote damages—Generally.—Delay caused by inability to collect debts, resulting from the wrongful attachment of books of account, is not an element to be considered in estimating the damages, as an attachment of the books is not an attachment of the debts.[47] Nor should the jury consider the fact that the levy of other executions was hastened by the issuance of the attachment.[48] And where, as a result of a levy upon part of a merchant's stock of goods, he is obliged to sell the remainder at less than its value, this latter loss is too remote to form the basis of an assessment of damages.[49] Again where, as a result of an attachment upon a horse, he is prevented from trotting or competing in races, in which he is entered, the loss of entrance fees paid by the owner for such horse, are not recoverable.[50] So also where, as the result of a wrongful attachment of a horse and wagon, the owner is prevented from gathering his corn, such loss cannot be recovered as actual damages.[51] And when a receiver pays taxes on funds, while in his hands under impounding orders, it is held, in Tennessee, that, in an action for wrongfully suing out an attachment or injunction and obtaining the impounding orders, such taxes are not proper elements to be considered in estimating the damages therefor, where the parties entitled to such funds are residents of the state.[52]

§ 1096. Mental suffering.—In some jurisdictions the rule prevails that no recovery can be had for mental suffering, as actual damages resulting from a wrongful levy upon personal property, but, if it appears that the writ was issued maliciously, then there may be a recovery, as exemplary damages, of compensation therefor.[53] In such a case, however, recovery will

[47] Goodbar v. Lindsley (Ark.), 11 S. W. 577.

[48] Goodbar v. Lindsley (Ark.), 11 S. W. 577.

[49] Casper v. Klippen, 61 Minn. 353; 63 N. W. 737. See also Reynolds v. Weiman (Tex. Civ. App.), 25 S. W. 33.

[50] Riley v. Littlefield, 84 Mich. 22; 47 N. W. 576.

[51] Lang v. Futz (Tex. Civ. App.), 38 S. W. 233.

[52] Stringfield v. Hirsch, 94 Tenn. 425; 29 S. W. 609.

[53] This rule has been applied in cases where personal property is taken by writ of attachment or sequestration. City Nat. Bank v. Jeffries, 73 Ala. 183; Pettit v. Mercer, 8 B. Mon. (Ky.) 51; Friell v. Plumer,

not be allowed, in the absence of some allegation or proof in reference thereto.[54] And, in Kentucky, it has been held that, in an action for maliciously suing out an attachment, injury to the feelings of the plaintiff should not be submitted to the jury, where he only alleges in his complaint, injury to his "credit, trade, and business reputation."[55]

§ 1097. Where one has part or special interest.—In an action by a person, who has a part or special interest in property which has been wrongfully seized under process, the measure of the damages, which he may recover, will be limited to the value of his interest in the property. Thus, it has been so held, in an action by a mortgagee,[56] or pledgee of goods.[57] And also, in an action by an officer where property held by him by levy under an execution, is taken from his possession, by another officer under a subsequent levy, his recovery will be limited to the amount of the execution under which his levy was made.[58] And, in case of a wrongful levy on personal property for the debt of a member of a firm, the other member cannot, in an action therefor, recover the entire value of the stock, unless it appear that he had the entire interest in the property.[59] Again, in an action by a vendee who is a bona fide purchaser of personal property, but who has paid a part only of the purchase money, against the sheriff, who has levied thereon in behalf of creditors of the vendor, the question whether he may recover, in excess of what has been paid by him, will depend on the extent of his liability to his vendor under the contract of purchase.[60] But where property, which has been conveyed by a deed of trust to a trustee for the purpose of securing creditors, is wrongfully attached unless it

69 N. H. 498; 43 Atl. 618; Crawford v. Doggett, 82 Tex. 139; 17 S. W. 929; Williams v. Yoe, 19 Tex. Civ. App. 281; 46 S. W. 659; Carson v. Texas Installment Co. (Tex. Civ. App.), 34 S. W. 762; 4 Cyc. 881.

[54] Evans Co. v. Kingsbury (Tex. Civ. App.), 25 S. W. 729.

[55] Abohosh v. Buck, 19 Ky. Law Rep. 1267; 43 S. W. 425.

[56] Rocheleau v. Boyle, 12 Mont. 590; 31 Pac. 533. See Hamilton v. Lan, 24 Neb. 59; 37 S. W. 688.

[57] Cramer v. Marsh, 5 Colo. App. 302; 38 Pac. 612. See Martin-Brown Co. v. Henderson, 9 Tex. Civ. App. 130; 28 S. W. 695.

[58] Allen v. Davis, 53 Mo. App. 15.

[59] Houghton v. Puryear, 10 Tex. Civ. App. 383; 30 S. W. 583.

[60] Biddell v. Munro (Minn.), 52 N. W. 141.

clearly appears that the value of the property is in excess of what is necessary to secure the debts and expenses of executing the trust, the trustee will be entitled to recover its full value.[61]

§ 1098. Attachment of lease.—Where the lease of a storehouse is wrongfully attached, damages therefor may be recovered, and this is declared to be so though the leasehold estate could not, without the landlord's consent, be transferred or sold by the lessee or sold under execution.[62]

§ 1099. Where property of third person attached.—Where the property of a third person is attached, as that of the defendants, the former may recover for loss of profits sustained by him, while excluded from possession of the same.[63] And if, under such process, the property is sold, the measure of damages will be the value of the property at the time it was taken.[64] But where the property attached was by an agreement to be sold at a certain price, this will be the measure of damages, where such sale was lost as a result of the attachment, regardless of the market value.[65]

§ 1100. Where property sold under the wrongful process.—In case of a wrongful levy or attachment of personal property, which is subsequently sold under such proceedings, the measure of damages, in an action by the owner thereof, will not be the amount received for such property on the sale, where that amount does not equal the value of the property, but he is entitled to recover its value at the time of seizure.[66] But in an action for

[61] White v. Sterzing, 11 Tex. Civ. App. 553; 32 S. W. 909.

[62] Scott Grocer Co. v. Kelly, 14 Tex. Civ. App. 136; 36 S. W. 140.

[63] Ebenreiter v. Dahlman, 19 Misc. (N. Y.) 9; 42 N. Y. Supp. 867, aff'g 18 Misc. 351; 41 N. Y. Supp. 559.

[64] Vaughn v. Fisher, 32 Mo. App. 29; Dudley v. Green, 46 S. C. 199; 24 S. E. 186.

[65] Curry v. Catlin, 12 Wash. 322; 41 Pac. 55.

[66] Smith v. Zent, 83 Ind. 87; 43 Am. Rep. 61; Union Mercantile Co. v. Chandler, 90 Iowa, 650; 57 N. W. 595; Woolner v. Spalding, 40 Miss. 151; 3 So. 583; Eichelmann v. Weise, 7 Mo. App. 87; Randall v. Greenhood, 3 Mont. 506; Maul v. Drexel, 55 Neb. 446; 76 N. W. 163; Ward v. Benson, 31 How. Pr. (N. Y.) 411; Dudley v. Green, 46 S. C. 199; 24 S. E. 186; Grabfelder v. Lockett (Tex. Civ. App.), 26 S. W. 168. See Cole v. Stearns, 20 Misc. (N. Y.) 502; 46 N. Y. Supp. 238. But see Williams v. Dodson, 26 S. C. 110; 1 S. E. 421.

a wrongful levy, the plaintiff cannot recover the full value, where, at the time of such levy, the whole property was in possession of another attaching creditor under a prior writ under which the sale was made.[67] And where the owner of the property bids it in on such a sale, or it is bid in for him, or he subsequently buys it back from the purchaser, the amount paid at the sale by him, or to the purchaser, in order to regain such property may be recovered by him with interest thereon, provided the amount so paid does not exceed the value of the property.[68] In such a case, it is decided in a recent decision in Texas that the measure of damages includes, in addition to the amount so paid, interest on the value of the property from the time it was seized to time of sale, interest on the amount paid at the sale from time of sale, and any depreciation in the value of the property while it was so held.[69]

§ 1101. Exempt personal property—Double damages.—In Illinois, it has been decided that a statute in that state, providing that where exempt personal property is sold under execution, double damages may be recovered, applies to the interest which a tenant in common has in indivisible chattels.[70]

§ 1102. Mitigation of damages.—A return of the property seized may be considered in mitigation of damages,[71] as may also the application of part or all of the proceeds of the attached property to the payment of the debt of, or the judgment recovered against, the attachment debtor.[72] But where goods are

[67] Emerson v. Converse, 106 Iowa, 330; 76 N. W. 705.

[68] Moore v. Batten, 5 Misc. (N. Y.) 20; 25 N. Y. Supp. 141; Jones v. Allsbrook, 115 N. C. 46; 20 S. E. 170; Sensinger v. Boyer, 153 Pa. St. 628; 26 Atl. 222; 32 W. N. C. 104; Munster v. Fields, 89 Tex. 102; 33 S. W. 852; Scott Grocer Co. v. Kelly, 14 Tex. Civ. App. 136; 36 S. W. 140; Sprague v. Brown, 40 Wis. 612.

[69] Field v. Munster, 11 Tex. Civ. App. 341; 32 S. W. 417.

[70] Heckel v. Grewe, 26 Ill. App. 339, aff'd 125 Ill. 58; 17 N. E. 437; 14 West. 674.

[71] Castile v. Ford, 53 Neb. 507; 73 N. W. 945; McFadden v. Whitney (N. J.), 18 Atl. 62; Kerr v. Mount, 28 N. Y. 659; Lyon v. Yates, 52 Barb. (N. Y.) 237; Haumer v. Wilsey, 17 Wend. (N. Y.) 91; Reynolds v. Shuler, 5 Cow. (N. Y.) 323.

[72] Scanlan v. Ginling, 63 Ark. 540; 39 S. W. 713; Kapischki v. Koch, 180 Ill. 44; 54 N. E. 179, aff'g 7 Ill. App. 238; Ruthven v. Beckwith, 84 Iowa, 715; 45 N. W. 1073; Ashcraft v. Elliott, 18 Ky. Law Rep. 934; 38 S. W. 1062.

seized, under an illegal attachment, the fact cannot be considered in mitigation of damages, that there was a subsequent sale under an execution issued in the suit;[73] nor is evidence admissible, for such purpose, that a part of the proceeds of the sale was applied to the payment of plaintiff's rent;[74] nor can it be shown that the debtor would probably have sold the goods at a reduced price within a short time after the levy;[75] nor that there was a subsequent attachment of the property by another creditor and the proceeds applied to the payment of the latter's debt, where they acted in collusion in executing the regular process.[76] So, again, it is not proper to consider in mitigation of damages, in an action against the officer by whom the property was sold under void process, that there was a tender, by the latter, of a part of the value of such property.[77] And where there was a valid transfer of the property to a person before the wrongful attachment of the same by a creditor of the transferrer, the voluntary surrender, by such creditor, of the goods to a trustee in insolvency of the debtor, cannot be considered in mitigation of the damages against the attachment creditor in an action by the person to whom the property was originally transferred.[78]

§ 1103. Exemplary damages.—In actions for a wrongful attachment or levy of personal property exemplary damages may, in some cases, be recovered.[79] But in order to justify a

[73] Tiffany v. Lord, 65 N. Y. 310.

[74] Graham v. McCreary, 40 Pa. St. 515.

[75] Estes v. Chesney (Ark.), 16 S. W. 267.

[76] Wehle v. Spelman, 25 Hun (N. Y.), 99. See Needham Piano & O. Co. v. Hollingsworth (Tex. Civ. App.), 40 S. W. 750.

[77] Clark v. Hallock, 16 Wend. (N. Y.) 607.

[78] Greenthal v. Lincoln, S. & Co., 68 Conn. 384; 36 Atl. 813.

[79] Willis v. Miller, 29 Fed. 238; Brown v. Master, 104 Ala. 451; 16 So. 443; Trammell v. Ramage, 97 Ala. 666; Jefferson County Sav. Bank v. Eborn, 84 Ala. 529; 4 So. 386; Palmer v. Reed (Ariz.), 43 Pac. 219; Bates v. Callendar, 3 Dak. 256; Mitchell v. Andrews, 94 Ga. 611; 20 S. E. 130; Jones v. Lamon, 92 Ga. 529; 18 S. E. 423; Sherman v. Dutch, 16 Ill. 283; Union Mill Co. v. Prenzler, 100 Iowa, 540; 69 N. W. 876; Byford v. Gerton, 90 Iowa, 661; 57 N. W. 588; Morris v. Shew, 29 Kan. 661; Chaffe v. MacKenzie, 43 La. Ann. 1062; Cronfeldt v. Arrol (Minn.), 52 N. W. 857; Favorite v. Cottril, 62 Mo. App. 119; Frank v. Curtis, 58 Mo. App. 349; Nagle v. Mullison, 34 Pa. St. 48; Smith v. Mather (Tex. Civ. App.), 49 S. W. 257; Willis v. McNatt, 75 Tex. 69; Waugh v.

recovery of such damages there should be some showing of fraud, malice, gross negligence or oppression in either suing out the writ or in levying upon the property.[80] So the recovery should be limited to the damage actually sustained, where the attaching creditor acted in good faith, though on insufficient cause,[81] and exemplary damages cannot be recovered for mental suffering, in the absence of malice or wantonness.[82] And it has been decided that an attaching creditor will not be liable for the malice of his agent or attorney, in suing out and levying an attachment, where he did not participate in the agent's malice, or approve or ratify the levy with knowledge thereof.[83] So, also, an attaching creditor may show, in order to prevent an allowance of exemplary damages, that he, in good faith, sought and followed the advice of an attorney.[84] Nor are they recoverable, where no actual damages are shown.[85] And they should not be allowed for the levy of an execution in ignorance of the

Dabney, 12 Tex. Civ. App. 290; 33 S. W. 753; Steel v. Metcalf, 4 Tex. Civ. App. 313; 23 S. W. 474; Farr v. Swigart, 13 Utah, 150; 44 Pac. 711; Sloan v. Langert, 6 Wash. 26; 4 Cyc. 768, 872, 875. In Washington it has been decided that the exemplary damages authorized under the code of that state (Wash. Code Proc. sec. 295), are not awarded by way of punishment, but are rather actual damages of an indeterminate character, some of which may be more or less sentimental. Levy v. Fleischner, 12 Wash. 15; 40 Pac. 384.

[80] Crofford v. Vassar, 95 Ala. 548; Crymble v. Mulvaney, 21 Colo. 203; 40 Pac. 499; Adams v. Gillam, 53 Kan. 131; 36 Pac. 51; Chaffe v. MacKenzie, 43 La. Ann. 1062; 10 So. 369; Townsend v. Foulenot, 42 La. Ann. 890; 8 So. 616; Talbot v. Great Western Plaster Co., 86 Mo. App. 558; Cunningham v. Sugar, 9 N. M. 105; 49 Pac. 910; 15 Nat. Corp. Rep. 430; Wallace v. Williams, 37 N. Y. St. R. 812; Chappell v. Ellis, 123 N. C. 259; 31 S. E. 709; Land v. Klein, 21 Tex. Civ. App. 3; 50 S. W. 638; Kirbs v. Provine, 78 Tex. 353; Yarborough v. Weaver, 6 Tex. Civ. App. 215; 25 S. W. 468; Burris v. Booth (Tex. Civ. App.), 40 S. W. 186; Hilfrich v. Meyer, 11 Wash. 186; Anderson v. Sloane, 72 Wis. 566; 40 N. W. 214.

[81] Talbot v. Great Western Plaster Co., 86 Mo. App. 558.

[82] Chappell v. Ellis, 123 N. C. 259; 31 S. E. 709.

[83] Jackson v. Smith, 75 Ala. 97; City Nat. Bank v. Jeffries, 73 Ala. 183; Foster v. Pitts, 63 Ark. 387; O'Berne v. O'Donnell, 35 Ill. App. 180; Thompson v. Bell, 11 Tex. Civ. App. 1; 32 S. W. 142; Rankin v. Bell, 85 Tex. 28; 19 S. W. 874. See also Baldwin v. Walker (Ala.), 8 So. 364; 4 Cyc. 876, 877.

[84] Baldwin v. Walker, 94 Ala. 514; 10 So. 391; Gedusky v. Rubinsky, 8 Pa. Dist. R. 10; 21 Pa. Co. Ct. 514; Scott Grocer Co. v. Kelly, 14 Tex. Civ. App. 136; 36 S. W. 140. See secs. 440, 441, herein, as to advice of attorney in malicious prosecution.

[85] Myers v. Wright, 44 Iowa, 38; Guard v. Moore, 86 Tex. 675; 26 S. W. 945, aff'g 24 S. W. 652; 4 Cyc. 876.

filing of a supersedeas bond.[86] But where such damages would be justified, in an action against an individual, it has been decided that they may be recovered against a corporation.[87] And the right to recover them may survive to the personal representatives of the attachment debtor, who dies pending action by him on the bond.[88] The amount which should be allowed as exemplary damages is for the jury to determine, and should not be waived by the court.[89] And an award of such damages by the jury will not be disturbed except in extreme cases.[90] So where both actual and exemplary damages are claimed, a verdict will not be disturbed as excessive, if, under the evidence, exemplary damages might have been awarded.[91]

§ 1104. Evidence as to value.—The value of the property seized may be shown in an action for wrongful attachment.[92] So for this purpose one who had charge of the property prior to the levy thereon, assisted in the sale, and knew the cost value of the same, and what it actually brought on the market, may testify as to its value in an action for wrongful seizure of the same under execution.[93] And purchasers, from an insolvent debtor, of a stock of goods, who assisted in making the inventory at the purchase, were in possession for several days and sold out the goods not attached, may, in an action against the marshal for wrongful seizure under attachment against the debtor, testify as to the value of such goods.[94] So, also, in an action for wrongful levy on the trade fixtures and stock of a merchant, one who has been in the same business for several years and who was employed in plaintiff's business at the time of the levy and was familiar with the stock as well as its value, is competent to testify as an expert as to such value.[95]

[86] Neese v. Radford (Tex.), 19 S. W. 141.

[87] Jefferson County Sav. Bank v. Eborn, 84 Ala. 529; 4 So. 386.

[88] Union Mill Co. v. Prenzler, 100 Iowa, 540; 69 N. W. 876.

[89] Lister v. Campbell (Tex. Civ. App.), 46 S. W. 876.

[90] Union Mill Co. v. Prenzler, 100 Iowa, 540; 69 N. W. 873.

[91] Carpenter v. Scott, 86 Iowa, 563; 5 N. W. 328.

[92] Marx v. Leinkauf, 93 Ala. 453; 9 So. 818.

[93] Hindman v. Askew Saddley Co., 9 Kan. App. —; 57 Pac. 1050.

[94] Walker v. Collins (C. C. App. 8th C.), 50 Fed. 737.

[95] Rheinfeldt v. Dahlman, 19 Misc. (N. Y.) 162; 43 N. Y. Supp. 281, aff'g 18 Misc. 558; 42 N. Y. Supp. 465.

CHAPTER XLVI.

TROVER.

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§ 1105. Trover—Measure of damages—Generally.—As a general rule the measure of damages for the conversion of personal property is, in the absence of special circumstances, the value of the property at the time of conversion together with interest thereon.[1] Thus it has been so held in actions to recover for the

[1] New Dunderberg Min. Co. v. Old, 97 Fed. 150; 38 C. C. A. 89; Langford v. Rivinus (C. C. App. 2d C.), 75 Fed. 959; 45 U. S. App. 79; 33 L. R. A. 250; 21 C. C. A. 581; Taber v. Jenny, 1 Sprague (U. S.), 315; Loeb v.

conversion of a judgment,[2] of household furniture,[3] of the furnishings and business equipments of a store,[4] of deposits in coin,[5] of liquor,[6] and of animals.[7] And where goods are entrusted to a

Flash, 65 Ala. 526; Ryburn v. Pryor, 14 Ark. 505; Hamer v. Hathaway, 33 Cal. 117; Douglass v. Kraft, 9 Cal. 562; Burchinell v. Butlers, 7 Colo. App. 294; 43 Pac. 459; Hurd v. Hubbell, 26 Conn. 388; Cook v. Loomis, 26 Conn. 483; Lucky v. Roberts, 25 Conn. 486; Vaughan v. Webster, 5 Harr. (Del.) 256; Wright v. Skinner, 34 Fla. 453; 16 So. 335; Moody v. Caulk, 14 Fla. 50; Hewitt v. Brummell, 48 Ga. 481; Cushman v. Bonfield, 139 Ill. 219; 28 N. E. 937, aff'g 36 Ill. App. 436; Chic., etc., Dock Co. v. Dunlap, 32 Ill. 207; Gensburg v. Field, 104 Iowa, 599; 74 N. W. 3; Neeb v. McMillan, 98 Iowa, 718; 68 N. W. 438; Gentry v. Kelly (Kan.), 30 Pac. 186; Simpson v. Alexander, 35 Kan. 225; Shepard v. Pratt, 16 Kan. 209; Greer v. Powell, 1 Bush. (Ky.) 489; Johnson v. Sumner, 1 Metc. (Ky.) 172; Rogers v. Twyman (Ky.), 56 S. W. 665; Tower v. Haslam, 84 Me. 86; 24 Atl. 587; Brown v. Haynes, 52 Me. 578; Balt., etc., Ins. v. Dalrymple, 25 Md. 269; Sterling v. Garritee, 18 Md. 468; Beecher v. Denniston, 13 Gray (Mass.), 354; Parsons v. Martin, 11 Gray (Mass.), 111; Saltmarsh v. Chic. Grand Trunk Ry. Co., 122 Mich. 103; 80 N. W. 981; Woods v. Gear, 93 Mich. 143; 53 N. W. 14; Ripley v. Davis, 15 Mich. 75; Symes v. Oliver, 13 Mich. 9; Dallemand v. Janney (Minn.), 53 N. W. 805; Nesbitt v. St. Paul Lumber Co., 21 Minn. 491; Derby v. Gallup, 5 Minn. 119; Coffey v. National Bank, 46 Mo. 140; 2 Am. Rep. 488; State v. Smith, 31 Mo. 566; Funk v. Dillon, 21 Mo. 294; Hoime v. Bone, 69 Mo. App. 481; Thomas Mfg. Co. v. Huff, 62 Mo. App. 124; Bennett v. McDonald, 59 Neb. 234; 80 N. W. 826; Coburn v. Watson, 48 Neb. 257; 67 N. W. 171; Carlyon v. Lannon, 4 Neb. 156; Gardner v. Brown (Nev.), 37 Pac. 240; Wyckoff v. Bodine (N. J.), 47 Atl. 23; Griggs v. Day, 136 N. Y. 152; 48 N. Y. St. R. 853, rev'g 46 N. Y. St. R. 967; Prince v. Conner, 69 N. Y. 608; Wehle v. Haviland, 69 N. Y. 448; Mechanics & Traders Bank v. Farmers & Mechanics Bank, 60 N. Y. 40, rev'g 2 S. C. 395; Suydam v. Jenkins, 5 Robt. (N. Y.) 507; Devlin v. Pike, 5 Daly (N. Y.), 85; Fleischmann v. Samuel, 18 App. Div. 97; 45 N. Y. Supp. 404; Johnston v. Albany Dry Goods Co., 12 App. Div. (N. Y.) 608; 43 N. Y. Supp. 164; Washburn v. Carthage, 86 Hun (N. Y), 396; 33 N. Y. Supp. 505; 67 N. Y. St. R. 218; Penfield v. Sage, 71 N. Y. 573; 55 N. Y. St. R. 122; 24 N. Y. Supp. 994; Kennedy v. Strong, 14 Johns. (N. Y.) 128; Coffee v. Bertrand, How. App.

[2] Langford v. Rivinus (C. C. App. 2d C.), 45 U. S. App. 79; 33 L. R. A. 250; 21 C. C. A. 581; 75 Fed. 959.

[3] Burchinell v. Butlers, 7 Colo. App. 294; 43 Pac. 459.

[4] Johnston v. Albany Dry Goods Co., 12 App. Div. 608; 43 N. Y. Supp. 164.

[5] Coffey v. National Bank, 46 Mo. 140; 2 Am. Rep. 488. For conversion of gold coin value is to be estimated in currency. Taylor v. Ketchum, 5 Robt. (N. Y.) 507. See also Bank of the State v. Burton, 27 Ind. 426.

[6] Washburn v. Carthage Nat. Bank, 86 Hun (N. Y.), 396; 33 N. Y. Supp. 505; 67 N. Y. St. R. 218.

[7] Alexander v. Osborn, 21 Wkly. Dig. (N. Y.) 298.

common carrier for shipment, the measure of damages for their conversion by the carrier, is their value in the exact condition in which they were in at the time of conversion, with interest from such time, and not what could have been realized on the goods at retail.[8] So, also, such is declared to be the measure of damages where goods entrusted to an agent have been attached by his creditors.[9] But in an action of trover by the officer against the receiptor who has allowed the property to go back into the hands of the debtor, the value as fixed in the receipt will constitute the basis of the measure of damages, where the amount of the judgment recovered is in excess of the value of such property.[10] If, however, property which has been converted has been returned to the owner, the measure of damages in such a case is declared to be the difference between the value of the property at the time of the conversion and its value when returned.[11] Evidence also as to profits which could have been realized on the sale of the converted goods by the plaintiff has been held admissible.[12]

§ 1106. Nominal damages.—Evidence as to the value or from which the value of the property converted may be deter-

Cas. 224; Dillenback v. Jerome, 7 Cow. (N. Y.) 294; Spicer v. Waters, 65 Barb. (N. Y.) 227; Alexander v. Osborn, 21 Wkly. Dig. (N. Y.) 298; Backenstoss v. Taylor, 33 Pa. St. 251; Drennen v. Charles, 12 Pa. Super. Ct. 476; 17 Lanc. L. Rev. 145; Conner v. Hillier, 11 Rich. (S. C.) 193; Sanders v. Anderson, 10 Rich. (S. C.) 232; Burney v. Pledger, 3 Rich. (S. C.) 191; Merchants Nat. Bank v. Trenholm, 12 Heisk. (Tenn.) 520; Jones v. Allen, 1 Head. (Tenn.) 626; Temple Grocer Co. v. Sullivan, 18 Tex. Civ. App. 281; 44 S. W. 401; Barnes v. Darby, 18 Tex. Civ. App. 468; 44 S. W. 1029; Texas & P. R. Co. v. Payne, 15 Tex. Civ. App. 58. 38 S. W. 366; Waller v. Hall (Tex. Civ. App.), 46 S. W. 82; Tucker v. Hamlin, 60 Tex. 171; Moore v. Aldrich, 25 Tex. 276; Tilden v. Johnson, 52 Vt. 628; 36 Am. Rep. 769; Park v. Daniels, 37 Vt. 594; Crumb v. Oaks, 38 Vt. 506; Ingram v. Conkin, 47 Wis. 406; Ainsworth v. Bowen, 9 Wis. 348; Mercer v. Jones. 3 Camp. 477; Finch v. Blount, 7 C. & P. 478. See subsequent sections in this chapter, where exceptions to this rule are considered.

[8] Texas & P. R. Co. v. Payne, 15 Tex. Civ. App. 58; 38 S. W. 366. See in this connection Hoime v. Bone, 69 Mo. App. 481.

[9] Barnes v. Darby, 18 Tex. Civ. App. 468; 44 S. W. 1029.

[10] Cross v. Brown, 41 N. H. 283.

[11] Stillwell v. Farwell (Vt.), 24 Atl. 243. See sec. 1110 herein.

[12] Ebenreitter v. Dahlman, 18 Misc. (N. Y.) 351; 41 N. Y. Supp. 559, aff'd 19 Misc. (N. Y.) 9; 42 N. Y. Supp. 867.

mined is essential to the recovery of substantial damages, and where no such evidence is given only nominal damages can be recovered.[13] Such damages also are only recoverable where the property is attached by a creditor of the owner before service of the writ,[14] or where a necessary payment which should have been made before the removal of the property is subsequently made,[15] or where, though the property was not delivered to the plaintiff on demand, yet he subsequently obtains possession of the same without suffering any loss.[16] And again, where the plaintiff obtains possession of the property, which is at his request levied on by one of his creditors, he will be only entitled to nominal damages.[17] So also, where no actual damage is sustained by the attachment by an officer of exempt personal property, in an action against him in trover therefor, only nominal damages can be recovered.[18] But where, in an action for the conversion of a certificate of stock, the plaintiff is entitled to recover, the measure of damages will not be limited to the value of the paper certificate, and thus merely nominal, but the certificate will be considered as representing shares of stock, and the damages will be assessed on the basis of the value of such shares.[19]

§ 1107. Special damages.—Special damages to be recoverable, in an action for the conversion of property, must be such as are the immediate consequence of the deprivation of such property.[20] Expenses of an unsuccessful suit against a person cannot be recovered as special damages.[21]

[13] Douglass v. Hobe, 36 App. Div. (N. Y.) 638; 55 N. Y. Supp. 849; Whitmark v. Lorton, 15 Daly (N. Y.), 548; 29 N. Y. St. R. 332; 8 N. Y. Supp. 48. See also Thornton v. Dwight Mfg. Co., 120 Ala. 653; 25 So. 22; Drum v. Harrison, 83 Ala. 384; 3 So. 715.

[14] Jones v. Cobb, 84 Me. 153; 24 Atl. 798.

[15] Pendill v. Lucy Min. Co. (Mich.), 62 N. W. 1024; 2 Det. L. N. 76.

[16] Simon v. Seide, 24 Misc. (N. Y.) 186; 52 N. Y. Supp. 629.

[17] Perkins v. Freeman, 26 Ill. 477.

[18] Cooper v. Newman, 45 N. H. 339.

[19] Morton v. Preston, 18 Mich. 60.

[20] Wood v. Gear, 93 Mich. 143; 53 N. W. 14; Bennett v. Lockwood, 20 Wend. (N. Y.) 223; Miller v. Garling, 12 How. (N. Y.) 204; Smith v. Connor (Tex. Civ. App.), 46 S. W. 267, wherein it is held that where such damages are claimed as growing out of the deprivation of the use of the property, it must be shown, either by direct allegations or by facts implying notice, that there was knowledge on the part of the defendant of the use to which such property had been put.

[21] Wilson v. Mathews, 24 Barb. (N. Y.) 295.

§ 1108. Exemplary damages.—Exemplary damages may be recovered, in certain cases, in actions for the conversion of personal property, as in the case of malice, or oppression, or wilful or wanton conduct on the part of the wrongdoer.[22] So for the conversion of coal by a railroad company exemplary damages may be recovered, where the company obtained the coal under a promise not to use it until paid for, but with the purpose of using it and not paying for it.[23] And under the California Code,[24] which allows exemplary damages against a defendant who has been guilty of oppression, fraud, or malice, such damages were allowed against one for the conversion of property, where the property was taken in the absence of the owner thereof, against the protests of the latter's wife, and with a considerable display of violence, though the defendant believed he had a right to the property.[25] But where punitive damages are sought, as for a malicious conversion, evidence is admissible that the plaintiff was notified by the defendant after the conversion that he could have his property.[26] And again, for the purpose of defeating a claim for such damages on the ground that the property was forcibly taken by defendant, evidence is admissible of an agreement between the defendant and a third party, by which the former obtained possession of the goods.[27] As a general rule the question whether exemplary damages should be allowed in such actions is one for the jury to decide and not for the court.[28]

§ 1109. Mitigation of damages.—In actions for the conversion of personal property the defendant may show that no damage at all has been suffered by the plaintiff or that his damages are merely nominal.[29] Or other facts which, while not reducing the damages to a merely nominal sum, may be shown under certain circumstances in mitigation of damages. So, in an ac-

[22] Heard v. James, 49 Miss. 236; Mowry v. Wood, 12 Wis. 413.

[23] San Antonia & A. P. R. Co. v. Kniffin, 4 Tex. Civ. App. 484; 23 S. W. 457.

[24] Cal. Civ. Code, sec. 3294.

[25] Lothrop v. Golden (Cal.), 57 Pac. 394.

[26] Bitterman v. Hearn (Tex. Civ. App.), 32 S. W. 341.

[27] Slocum v. Putnam (Tex. Civ. App.), 25 S. W. 52.

[28] Carson v. Smith, 133 Mo. 606; 34 S. W. 855.

[29] Stone v. Chic. M. & St. P. R. Co. (S. D.), 53 N. W. 189.

tion for the conversion of certificates of deposit, evidence is admissible, on behalf of the defendant, that payment had been demanded and refused at the time of the alleged conversion, such evidence tending to show the insolvency of the maker of such certificates and that they had depreciated in value.[30] And, where goods have been taken under an honest belief of title, the defendant may show, in mitigation of damages, that they were subsequently distrained for rent due by the owner.[31] So, in an action for the conversion of goods, where the defendant has purchased a chattel mortgage thereon, he may set up such purchase in mitigation of damages,[32] or the acquisition of title to property pending the action is declared in California to be available to mitigate the damages to the extent of the value of the property at the time of trial.[33] So also, the application of the proceeds of property to the payment of an existing lien thereon, or otherwise to the use of plaintiff, may be shown by the defendant, to mitigate the damages.[34] And the payment and acceptance of money on account of the value of the converted property may also be considered.[35] As a general rule, in such actions, the burden of establishing facts which go in mitigation of the damages rests on the defendant.[36]

§ 1110. Mitigation of damages—Return of property.—In an action of trover a return of the property taken may be considered in mitigation of damages where it appears that the owner has accepted the property and exercised acts of ownership over it.[37] And a recovery from a third person of a part of the goods

[30] First Nat. Bank v. Dickson (Dak.), 40 N. W. 351.

[31] Higgins v. Whitney, 24 Wend. (N. Y.) 379; Sherry v. Schuyler, 2 Hill, 204.

[32] Smith v. Reeves, 33 How. Pr. (N. Y.) 183.

[33] George v. Pierce, 123 Cal. 172; 55 Pac. 775.

[34] Prescott v. Wright, 6 Mass. 20; Coldwell v. Eaton, 5 Mass. 399; Pierce v. Benjamin, 14 Pick. (Mass.) 356; Cooper v. Newman, 45 N. H. 339; Chezum v. Parker, 19 Wash. 645; 54 Pac. 22. See also Lithaur v. Taggart, 19 Wkly. Dig. (N. Y.) 421.

[35] Meeks v. Simon, 2 Misc. (N. Y.) 241; 51 N. Y. St. R. 421. See also Pierce v. Benjamin, 14 Pick. (Mass.) 356.

[36] Stone v. Chic. M. & St. P. R. Co., 8 S. D. 1; 2 Am. & Eng. R. Cas. N. S. 514; 65 N. W. 29.

[37] Greenfield Bank v. Leavitt, 17 Pick. (Mass.) 1; Lucas v. Trumbull, 15 Gray (Mass.), 306; People v. Bank of North America, 75 N. Y. 547;

converted and a payment, on account of the balance, should be considered in estimating the damages against the person converting the same.[38] But evidence of an unaccepted tender of the property converted is not to be considered in mitigation of damages.[39] Nor can the defendant show for this purpose a subsequent return of the property without the plaintiff's consent.[40] Where, however, the return is procured by the offer of a reward, this amount with interest, from the time of payment should be deducted from the value of the property restored.[41]

§ 1111. What not considered in mitigation of damages.— There can be no allowance in mitigation of damages, in an action against one for the conversion of personal property, of any claim for storage, insurance or commissions.[42] Nor should the defendant be allowed to avail himself of anything which lessens the value of the property while in his wrongful possession.[43] And, where the taking is illegal, the defendant cannot show in mitigation of damages a subsequent legal attachment.[44] And again, a person, who has wrongfully converted the property of another, cannot, in an action to recover therefor, mitigate the damages resulting from his conversion, by applying such property to the use of another against whom legal recourse for its recovery may be had by the owner who, however, does not elect to proceed against such third party.[45] So also, the damages in such an action cannot be mitigated by evidence of foreclosure

Reynolds v. Shuler, 5 Cow. (N. Y.) 323; Dailey v. Crowley, 5 Lans. (N. Y.) 301. See Hallett v. Novion, 14 Johns. (N. Y.) 273; Hogan v. Kellum, 13 Tex. 396.

[38] Nulser v. Lewis, 14 Abb. N. C. (N. Y.) 333.

[39] Carpenter v. Manhattan Life Ins. Co., 22 Hun (N. Y.), 47; Smith v. Hartog, 23 Misc. (N. Y.) 353; 51 N. Y. Supp. 257; Hofschulte v. Panhandle Hardw. Co. (Tex. Civ. App.), 50 S. W. 608. See also Stickney v. Allen, 10 Gray (Mass.), 352. But see Farr v. Hunt (Wis.), 58 N. W. 377.

[40] Kelly v. Meiser, 21 App. Div. (N. Y.) 253.

[41] Greenfield Bank v. Leavitt, 17 Pick. (Mass.) 1. See Pierce v. Benjamin, 14 Pick. (Mass.) 356; Ford v. Williams, 24 N. Y. 359.

[42] Walther v. Wetmore, 1 E. D. Sm. (N. Y.) 7.

[43] Carter v. Streator, 4 Jones L. (N. C.) 62.

[44] Hanmer v. Wilsey, 17 Wend. (N. Y.) 91. See also Otis v. Jones, 21 Wend. (N. Y.) 394; Lyon v. Yates, 52 Barb. (N. Y.) 237.

[45] First Nat. Bank v. Lyman, 59 Kan. 410; 53 Pac. 125, rev'g 6 Kan. App. 74; 49 Pac. 639.

proceedings, of a chattel mortgage on the converted property where the foreclosure was invalid owing to failure to comply with certain statutory requirements, nor can the jury add the cost of such invalid proceedings to the amount of the mortgage debt and deduct the same from the value of the property as found by them.[46] Nor should the jury consider in mitigation of damages, the fact that, on the appointment of a receiver, the goods were temporarily out of the possession of the defendant.[47] And for the conversion of goods by one to whom they were consigned for sale, the ownership of the goods having been determined in favor of the plaintiff, the jury should not credit the defendant in their estimation of the damages with the amount of a claim which he had against the plaintiff.[48] In a case in North Carolina,[49] which was an action for the conversion of a mule purchased by the plaintiff from a person since deceased and in which it appeared that the defendant also claimed title by purchase from such decedent, and that the plaintiff tendered to defendant the sum of ten dollars, which was the balance due to the seller on the price of the mule, it was held that it was not error for the court to refuse to charge that the ten dollars was a lien on the mule, and that if they found for plaintiff, they should deduct such amount from the value of the mule, since the balance due was a debt owing to the estate of the seller and not to the defendant.

§ 1112. Plaintiff tenant in common with others of property converted—Abatement of damages.—While the fact that the property converted belongs to the plaintiff, as tenant in common with others, is no legal defense to an action for the conversion, yet such fact may be available in abatement or by apportionment of the damage.[50]

§ 1113. Market value—What is.—In determining the market value of converted property it is not necessary to confine the

[46] Chezum v. Parker, 19 Wash. 635; 54 Pac. 22.

[47] Cormer v. Batty, 10 J. & S. (N. Y.) 423.

[48] Cohen v. Salet, 49 N. Y. St. R. 144; 2 Misc. 51.

[49] Little v. Ratcliff, 126 N. C. 262; 35 S. E. 469.

[50] Wing v. Milliken, 91 Me. 387; 40 Atl. 138.

value to the particular purpose or use to which it is devoted, but its value in any and all uses to which it is adopted and the highest price which it will bring for any of such uses may be considered.[51] And it is proper to instruct the jury, in an action for the conversion of a stock of goods, that the "market value" means the value of such goods at the time and place of conversion, when sold in bulk, and allowing the seller a reasonable time within which to sell them for cash, for if property is to be sold upon any market, it is only just to its owners to allow a reasonable time in which to sell it.[52]

§ 1114. Where property converted has no market value—Stocks and bonds.—In many instances it happens that the article converted has no market value but is of some special value to the owner, and, in such a case, as a general rule, the measure of damages is the special value of such property to him.[53] So, in an action for the conversion of stereotype plates, the actual value to the plaintiff of such plates, for use in his business is the proper measure of damages,[54] and in this connection evidence of the cost of replacing such plates is admissible.[55] And where the article converted was shown to have no market value, aside from the value of the materials, if used for another purpose, the plaintiff was permitted to recover the cost of constructing another article, similarly designed, for the same purpose as the one converted.[56] So also, for the conversion of abstracts of title and searches, the plaintiff may recover the cost of procuring other similar searches.[57] But in the case of private letters written by third persons to plaintiff, only nominal damages may be recovered, where they are not shown to possess any pecuniary value.[58] Where, however, the commercial value of an article

[51] Maul v. Drexel, 55 Neb. 446; 76 N. W. 163.

[52] Temple Grocer Co. v. Sullivan, 18 Tex. Civ. App. 281; 44 S. W. 401, per Key, Assoc. J.

[53] Lovell v. Shea, 45 N. Y. St. R. 574; 18 N. Y. Supp. 193.

[54] Stickney v. Allen, 10 Gray (Mass.), 352; Lovell v. Shea, 28 J. & S. (N. Y.) 412; 45 N. Y. St. R. 574; Heald v. MacGowan, 15 Daly (N. Y.), 233.

[55] Heald v. MacGowan, 15 Daly (N. Y.), 233.

[56] Scattergood v. Wood, 14 Hun (N. Y.), 269.

[57] Watson v. Cowdrey, 23 Hun (N. Y.), 169; Mowry v. Wood, 12 Wis. 413.

[58] Donohue v. Henry, 4 E. D. Sm. (N. Y.) 162.

which had been converted was not clearly ascertainable, and a value had been placed thereon by the owner, of which the wrongdoer had notice, it was declared that the court would not disturb a judgment for that amount.[59] And where property has no market value at the place of conversion, the market value of such property at places reasonably near, may, in some cases, be the measure of damages. Thus it was so held in an action for the conversion of a canal boat en route.[60] Again, in determining the actual value of the property converted, the price paid for such article may be some evidence of the actual value.[61] But where, subsequent to the conversion of shares of a corporation, its real and personal property was sold under foreclosure of a mortgage thereon owned by the parties charged with the conversion, the amount realized on such sale cannot be properly considered as the value of the assets of the corporation, in determining the value of the shares thereof, they having no market value.[62]

§ 1115. Place of value.—It may be stated generally that the measure of damages, in an action of trover, is estimated on the value of the property at the place of conversion, which is generally considered as the place where the wrongdoer took possession of such property. So, in trover for rafts converted at Pittsburg and sold at Cincinnati, it was held that, in the absence of aggravating circumstances, the measure of damages was the value of the lumber at Pittsburg, at which place there was a market, and that it was error to receive evidence of the value of the logs at Cincinnati.[63] And in Ward v. Carson River Wood Company,[64] which was an action to recover the value of wood alleged to have been converted by defendants at Empire City, Nevada, the wood having been first taken in Alpine county, California, the conversion was held to have taken place in Alpine county, where the wood was less valuable than at the for-

[59] Frankinstein v. Thomas, 4 Daly (N. Y.), 256.

[60] Kelley v. Paine, 34 Hun (N. Y.), 167, 176.

[61] Waterman v. American Pin Co., 19 Misc. (N. Y.) 638; 44 N. Y. Supp. 410.

[62] Feige v. Burt (Mich.), 83 N. W. 367. See also Industrial & General Trust Co. v. Tod, 64 N. Y. Supp. 1093.

[63] Hill v. Canfield, 56 Pa. St. 454.

[64] 13 Nev. 44.

mer place, and the plaintiff's recovery was limited to the value at Alpine county, he not being allowed to recover the enhanced value at Empire City, which was due to the labor and expenditure of the defendants. The place of conversion, however, is not in all cases confined to the place of the actual taking of the property. This extension of the rule is applied in some cases where, at the place of taking, the property had no market value, in which case the value of such property at the most convenient market has been allowed.[65] And again, where the property is transported or taken to another place, the value at the latter place may be allowed, based on the right of the plaintiff to have followed and taken possession of such property at the place to which taken. So, in Final v. Backus,[66] which was an action of trover to recover the value of certain logs which had been converted by defendant, and which were removed from the place where defendants first took possession of them and carried to Saginaw, it was declared by Chief Justice Cooley that "the action was trover for the conversion of these logs and as upon the theory of the plaintiff's case, they were the property of his assignor as well after they reached Saginaw, as before, we perceive no error in receiving evidence of their value at that place. The actual change in the character of the property appears to have taken place when they were manufactured into lumber there, and although the owner of the land from which they were taken might have treated their removal from the land as a conversion, he was not compelled to do so, but might have followed the logs and reclaimed them at Saginaw. This being so, the plaintiff had a right to treat the time of the manufacture of the logs into lumber as the period of conversion and to recover their value accordingly."[67] So, also, where goods converted by a carrier were delivered to him to be transported to another place, the value of such goods, at the place of destination, should control.[68]

§ 1116. Damages for use of property converted.—The

[65] Hudson v. Goodale, 22 Oreg. 68; 29 Pac. 70. See also Selkirk v. Cobb, 13 Gray (Mass.), 313.

[66] 18 Mich. 218.

[67] See also Everson v. Seller, 105 Ind. 266; 4 N. E. 854.

[68] Farwell v. Price, 30 Mo. 587; Hallett v. Novion, 14 Johns. (N. Y.) 273.

the property in specie and the owner being compelled to take its value, expenses incurred in attempting to recover the same will not, it has been decided, be allowed.[84] In this connection it is said in a recent case: "The rule permitting a plaintiff in an action of trover to have an allowance for expenses by him incurred in recovering property that has been wrongfully taken, seems to have been applied heretofore only in those cases where the property is actually recovered by the plaintiff and such recovery is pleaded by way of mitigation of damages. When the damages are thus mitigated the plaintiff is permitted to recoup his necessary expenses in recovering the property; but where there has been no eventual recovery of the property by the plaintiff and he is compelled to take its value as in the case at bar, the better view seems to be that the recovery is limited to the market value of the property at the time and place of conversion and interest."[85] In New York, however, it has been decided that the rule as to value of the property, with interest, being the measure of damages, is subject to many exceptions and that among them is the case where the "plaintiff being the true owner has been subjected to the loss of time or the payment of money in searching for the property unlawfully taken, in which case a reasonable allowance may be made by the jury for such time and expense in addition to the value of the property and interest . . . and a reasonable allowance for the time and expense incurred by the plaintiff in endeavoring to reclaim the property was a damage immediately proximate to the wrong act of the defendant.[86]

Pac. 394; Cal. Civ. Code, sec. 3336; Merrill v. Howe, 24 Me. 126; Greenfield Bank v. Leavitt, 17 Pick. (Mass.) 1; 28 Am. Dec. 268; Laughlin v. Barnes, 76 Mo. App. 258; 1 Mo. App. Rep. 492; Murray v. Burling, 10 Johns. (N. Y.) 172; Bennett v. Lockwood, 20 Wend. (N. Y.) 223; Anderson v. Sloan, 72 Wis. 566; 40 N. W. 214.

[84] United States v. Pine River Logging & Imp. Co. (C. C. App. 8th C.), 61 U. S. App. 69; 32 C. C. A. 466; 89 Fed. 907. See Collins v. Lowry, 78 Wis. 329.

[85] United States v. Pine River Logging & Imp. Co. (C. C. App. 8th C.), 89 Fed. 919; 61 U. S. App. 69; 32 C. C. A. 466, per Thayer, C. J., citing Ewing v. Blount, 20 Ala. 694; Collins v. Lowry, 78 Wis. 329; 47 N. W. 612; Cattle Co. v. Hall, 33 Fed. 236.

[86] McDonald v. North, 47 Barb. 532. See also Wibert v. New York & Erie R. R. Co., 19 Barb. (N. Y.) 48; Davis Sew. Mach. Co. v. Best, 50 Hun (N. Y.), 76; 4 N. Y. Supp. 510; Bennett v. Lockwood, 20 Wend. (N. Y.) 224; 32 Am. Dec. 532.

§ 1120. Good will—License.—The good will of a business or a nontransferable license are not elements which may be considered in assessing the damages in an action for conversion of the furniture and fixtures used in such business.[87]

§ 1121. Labor expended on converted property.—As a general rule where property is wilfully and tortiously converted, there can be no allowance to the wrongdoer, in an action of trover by the owner, for any labor, time or money expended upon the converted property by the former, whereby the value the property has been enhanced.[88] But where such expenditure has been made by one who had wrongfully converted the property, but had acted in good faith, there should be an allowance therefor, provided that such allowance does not deprive the plaintiff of compensation for the actual damages sustained.[89] So in one of the early cases in New York,[90] it is declared that where property is wilfully and tortiously taken, the plaintiff is entitled to recover any enhanced value due to labors of defendant. In this case saw logs were taken and converted into boards and plank and it was held that plaintiff was entitled to recover the enhanced value of the logs, and was not confined to their value, either in the woods or at the place where they were sawed into boards and plank. This case was followed by that of Sax v. Kimble,[91] which was also an action of trover for saw logs, boards and plank. It appeared on the trial of the case that certain saw logs had been cut on plaintiff's land and from there taken to defendant's sawmill, where they were by the latter converted into boards. As to the measure of

[87] Meier v. Wilkins, 15 App. Div. (N. Y.) 97; 44 N. Y. Supp. 274. The price for which the property was sold several months before the conversion is not, it has been held, sufficient evidence of market value at the time of conversion. O'Neill v. Patterson, 26 Misc. (N. Y.) 3; 55 N. Y. Supp. 617.

[88] Stuart v. Phelps, 39 Iowa, 14; Saunders v. Clark, 106 Mass. 331; Grant v. Smith, 26 Mich. 201; Foster v. Backus, 18 Mich. 218; Symes v. Oliver, 13 Mich. 9; Silsbury v. Calkins, 3 N. Y. 379; 53 Am. Dec. 307 n.; Baker v. Hart, 52 Hun (N. Y.), 365; Walthur v. Wetmore, 1 E. D. Sm. (N. Y.) 78; Curtis v. Groat, 6 Johns. (N. Y.) 168. But see Potter v. Maidre, 74 N. C. 36.

[89] Buckley v. Buckley, 12 Nev. 423; Penfield v. Sage, 71 Hun (N. Y.), 573; 55 N. Y. St. R. 122.

[90] Baker v. Wheeler, 8 Wend. 505; 24 Am. Dec. 66 n.

[91] 7 Cow. (N. Y.) 95.

damages, the judge charged the jury that it would be the value of the boards at the mill, although changed from logs to boards by defendant. The defendant through his counsel moved for a new trial on the ground that such charge was erroneous, but the motion was denied.[92] And a similar recovery was allowed in a late case where trees had been wrongfully taken and manufactured into shingles, the owner being allowed to recover the enhanced value of the timber as made into shingles.[93] The court declared that "the plaintiff was most clearly entitled to recover of the defendants the enhanced value of the timber in question as manufactured into shingles."[94]

§ 1122. Same subject continued.—In a case in Louisiana, where it appeared that a raft of logs had become stranded upon the land of the defendant and that the latter, though notified by the plaintiff of his intention not to abandon the raft, had proceeded to cut it up into firewood, which he sold at a price which, after deducting the value of the labor expended in cutting the logs up, exceeded their value in their original condition, it was held that as the defendant had by his own act put it out of his power to restore the thing in its enhanced condition he could not, upon being compensated for his own labor, be relieved from a judgment which required him to pay the enhanced value of the logs when cut up for firewood.[95] The court, however, declared in this case that "as the plaintiff has asked an affirmance of the judgment, it is not necessary to decide whether a possessor in bad faith under such circumstances is entitled to compensation for the labors bestowed upon it, and by which it has been converted into a more valuable form. But we may here remark that it is at best questionable. The policy of the civic law was to sanctify and uphold the right of property by discouraging

[92] Sutherland, J., dissented.

[93] Rice v. Hollenbeck, 19 Barb. (N. Y.) 664. See also Walther v. Wetmore, 1 E. D. Sm. 7.

[94] Per Mason, J., citing, Sax v. Kimble, 7 Cow. 95; Silsbury v. McCoon, 3 Comst. 379; 53 Am. Dec. 307, which was an action of trover for corn converted by a wilful trespasser and made into whiskey. Held in such case that property belonged to original owner. Betts v. Lee, 5 Johns. 348; 4 Am. Dec. 368; Shaw v. Crawford, 10 Johns. 237; Curtis v. Groat, 6 Johns. 168; 5 Am. Dec. 204.

[95] Eastman v. Harris, 4 La. Ann. 193.

and punishing wrongdoers; and we find a learned court of common law in a case very like the present applauding the wisdom of the civic law and citing it as authority. We refer to the case of Botts v. Lee,[96] where a party had trespassed upon another's land, cut down the timber and converted it into shingles. This was held not to change the title to the property, and the trespasser, it would seem, was not considered as having a right to remuneration for making them."[97] But in an early decision in Alabama,[98] which was an action in trover for fifteen hundred bushels of coal, it being claimed that the coal had been made from wood which had been converted from the land of the plaintiff, it was held that the plaintiff was entitled to maintain trover for the coal. The court said only upon the question of damages, "It is possible the jury might consider the value of the defendant's labor on the rough material in estimating the damages, but as to this we give no opinion as no point upon it was made in the court below."[99] Again, it has been held that if the property converted is by the labor of the wrongdoer converted into another species of property, as where timber has been cut and made into a canoe, the measure of damages is the value of the property in the shape in which it was taken.[100] And in an early English case, which was an action of trover for parcels of goods delivered to a dyer in the course of trade, the latter was held entitled to a lien on the goods for the price of dyeing, which price was deducted from plaintiff's recovery at time of taking the verdict, the value of the goods in white being only given to the plaintiffs. Debt due for dyeing of the goods, however, was held to be no lien, and was not allowed.[1] And in an early case in Massachusetts[2] the following facts appear: The plaintiff contracted for a sale of goods to a certain printing company. The cloths were sent to the printing company with an invoice, which stated the substance of the agreement. The consignees caused them to be printed, and consigned a part of

[96] 5 Johns. 349.
[97] Per Slidell, J.
[98] Riddle v. Driver, 12 Ala. 590.
[99] Per Goldthwaite, J.
[100] Potter v. Maidre, 74 N. C. 36. See in this connection the New York decisions just noted.

[1] Green v. Farmer, 4 Burr. 2214 (1768), opinion of court by Lord Mansfield.
[2] Dresser Mfg. Co. v. Waterston, 3 Metc. (Mass.) 9.

them to defendants to be sold, and the defendant, having no knowledge of the agreement between the original consignor and consignee, made advances upon the goods. The terms of the contract were not carried out and plaintiffs demanded their goods of defendants, who refused to deliver them. It was held that under the terms of the contract the property in the goods remained in the plaintiffs, and that the defendants were liable to them in trover, but that they could only recover the value of the goods in the original state in which consigned, and not their value after they were printed. So also, in a case in Canada, it is declared that the general rule in trover is, though not inflexible, that the jury should not assess damages at an amount larger than the value of the property at the time of conversion, where there is nothing special and unusual in the case. So this rule was applied in an action for the conversion of logs, where the evidence tended to show that the defendant, who had taken the logs to his mill and sawed them there, was not conscious of doing a wilful wrong but acted under a claim of right and not with a knowledge that he was taking the plaintiff's timber, and the plaintiff was held not entitled to recover the value of the logs in the state of sawed lumber.[3]

§ 1123. Confusion of goods.—The question as to the rights of the parties, in case of the confusion of goods, is one which may arise either in actions of trespass, conversion or replevin and is one which has been the subject of much discussion. In this class of cases the rule has prevailed that if one wilfully intermixes his goods with those of another, without the latter's consent or approbation, and so that the goods of each cannot be separated from the mass or distinguished, then, to guard against fraud, the entire property becomes his, whose original dominion has been invaded.[4] And in such a case it has been determined

[3] Morton v. McDowell, 7 Up. Can. Q B. 338. In this case it appeared that the plaintiff, with little if any reason to believe the defendant would deliver the lumber to him, sent a steamer and two barges to defendant's mill to carry it away after the latter had the sawed lumber rafted, and he refused to let the plaintiffs take it. Recovery was claimed for the expense incurred in sending the steamer and barges, but it was held plaintiff was not entitled to recover therefor.

[4] 2 Blacks. Com. 405. For application of this rule, see Stephenson v. Little, 10 Mich. 433.

that the owner may replevy the entire lot,[5] but otherwise if the intermixture be by mistake or in good faith.[6] In this latter class of cases the rule of compensation would require that the innocent party should recover the value of his property which, by the mistake of another, has been so intermixed, though it enure to the loss of the latter. But where the confusion was caused by the wilful and fraudulent act of another, and there can be no separation of their respective goods, for the purpose of preventing fraud, the wrongdoer may lose all interest in the confused goods, and such a doctrine may be sustained on the ground of exemplary damages.

§ 1124. Mental distress.—In assessing damages in an action for the conversion of personal property, mental suffering is not an element to be considered.[7]

§ 1125. Bailor and bailee.—The general rule, as to value at time of conversion, would ordinarily control in cases of conversion of property by a bailee, but in many cases the relation of the bailor and bailee is subject to terms and conditions which might perhaps alter the rule applicable in the particular case. So where property is left with a bailee to be cared for and sold, the proceeds, after deducting expenses to be paid over to the bailor, the value of the proceeds is the measure of damages in case of a conversion and sale by the former.[8] And where property, in such a case, has been pledged by the bailee, the measure of damages, in an action against the pledgee, is the amount for which the property could be replaced, less such sums as might have been paid thereon by the person taking such property for

[5] Wingate v. Smith, 20 Me. 287; Stephenson v. Little, 10 Mich. 433. See Hesseltine v. Stockwell, 30 Me. 237; 50 Am. Dec. 627. As to the general rule in such cases, see also Treat v. Barber, 7 Conn. 280; Gordon v. Jenney, 16 Mass. 465; Willard v. Rice, 11 Metc. (Mass.) 493; Banon v. Cobleigh, 11 N. H. 561; Roth v. Wells, 29 N. Y. 486; Hart v. Ten Eyck, 2 Johns. Ch. (N. Y.) 62; Bumbaur v. Marshall, 56 Vt. 365; Jenkins v. Steanka, 19 Wis. 128.

[6] Hesseltine v. Stockwell, 30 Me. 237; 50 Am. Dec. 627.

[7] Smith v. Connor (Tex. Civ. App.), 46 S. W. 267.

[8] McCready v. Phillips (Neb.), 63 N. W. 7. A similar rule prevails where property is entrusted to bailee to be exchanged. Chase v. Blaisdell, 4 Minn. 90.

sale.[9] In ordinary cases of the conversion and sale of property by a bailee, evidence as to the price brought for such property at an auction thereof, properly advertised and at which there was active competition, is admissible on the question of damages as showing the value.[10] It is the actual value which should control, and so where property is left with another for sale, at a specified price, such price is not the controlling factor in estimating the damages for a conversion thereof, but rather the actual value.[11] And where one, with whom goods are left on storage, wrongfully sells a part thereof, he cannot set off his claim for rent in an action to recover the entire value of such goods.[12]

§ 1126. Bonds.—The measure of damages, prima facie, for the conversion of a common-law redelivery bond in attachment to secure the payment of a judgment, is not merely the value of the attached property but the amount of the judgment,[13] and for the conversion of a bond conditioned for conveyance of land, the measure of damages is the value of the land.[14] Where, however, in the latter case certain obligations are imposed upon the plaintiff by the bond, it is proper to allow, in estimating the damages, what it would have cost the plaintiff to have fulfilled the obligations imposed.[15]

§ 1127. Carrier.—For the conversion of goods by a carrier, which are not thereafter accepted by the consignee, there may be a recovery of the value of such goods, the plaintiff not being limited to a recovery of the difference between the value at the time when they should have been delivered and time of offer of actual delivery.[16] But, if the carrier has a lien on the goods,

[9] Meeks v. Simon, 2 Misc. (N. Y.) 241; 51 N. Y. St. R. 421; 21 N. Y. Supp. 1004.

[10] Sanford v. Peck, 63 Conn. 486; 27 Atl. 1057.

[11] Sinnette v. Hoddick, 10 Misc. (N. Y.) 586; 64 N. Y. St. R. 30; 31 N. Y. Supp. 453.

[12] Sinamaker v. Rose, 62 Ill. App. 118.

[13] Johnson v. Dunn, 75 Minn. 533; 78 N. W. 98.

[14] Clowes v. Hawley, 12 Johns. (N. Y.) 484.

[15] Rogers v. Crombie, 4 Me. (4 Greenl.) 274.

[16] Baltimore & O. R. Co. v. O'Donnell, 49 Ohio St. 489; 21 L. R. A. 117; 32 N. E. 476; 28 Ohio L. J. 318.

for freight, the amount of such lien may be deducted in estimating the damages for the conversion and sale thereof by the carrier.[17]

§ 1128. Cattle.—In an action for the conversion of cattle a recovery may be had of the value of the cattle at the time of conversion,[18] although in one decision a recovery was permitted of the value at the time of judgment,[19] together with any increase at such time.[20] But evidence has been held inadmissible, in an action for the conversion of cows, as to the estimated loss of the calves and the milk which they might subsequently produce.[21]

§ 1129. Execution sale of property.—If property is wrongfully sold by virtue of an execution, a recovery may be had of the value of the property at the time of such sale, with interest, the damages not being limited to the amount paid for such property by the purchaser thereof.[22] And the measure of damages is the same, though the property is sold under an execution against the wrongdoer.[23] But where it is bid in by the owner, the recovery is limited to the amount of his bid.[24] And though the property is subject to a chattel mortgage, the damages will not be limited to a nominal sum by such fact, where a substantial sum is paid by the purchaser thereof, to whom possession is given.[25]

§ 1130. Fixtures.—In an action for the conversion of fixtures, evidence of their cost is admissible, as tending to show their value.[26] Evidence however of their value, when removed

[17] Briggs v. Boston, etc., R. R. Co., 6 Allen (Mass.), 246.

[18] Otter v. Williams, 21 Ill. 118. See Hendricks v. Evans, 46 Mo. App. 313; Thomas v. Sternheimer, 29 Md. 268.

[19] Morris v. Coburn (Tex.), 9 S. W. 345.

[20] Morris v. Coburn (Tex.), 9 S. W. 345. But see Scott v. McAlpine, 6 Up. Can. C. P. 302.

[21] Drennen v. Charles, 12 Pa. Super. Ct., 476; 17 Lanc. L. Rev. 145.

[22] Casey v. Chaytor, 5 Tex. C. A. 385; 23 S. W. 1114. See also Koyer v. White, 6 Tex. Civ. App. 381; 25 S. W. 46.

[23] Otis v. Jones, 21 Wend. (N. Y.) 394.

[24] Vedder v. Van Buren, 14 Hun (N. Y.), 250.

[25] Adams v. Hessian (Ind. App.), 39 N. E. 530.

[26] Greenbaum v. Taylor, 102 Cal. 624; 36 Pac. 957. See also Bahr v. Boley, 64 N. Y. St. R. 200; 50 App.

from their position, and considered without reference to the uses for which they were intended, is inadmissible where the action is for conversion of such property in place for use.[27] But for the conversion of store fixtures, which the owner is prevented from removing, his measure of damages is not their value in position to the occupant of the place, but what their value is to the owner after removal, where the only conversion is in preventing him from removing them and he has no right longer to retain or use them.[28]

§ 1131. Heirlooms and other property of peculiar value to owner.—The measure of damages in actions to recover for the conversion of heirlooms, pictures, unpublished manuscripts, etc., which owing to association or other causes are of peculiar value to the owner, should not be limited to mere compensation or actual value at the time and place of conversion.[29] Such property is not susceptible of supply and reproduction in kind, and the damages should be computed at the actual value to him who owns it, with reasonable consideration of, and sympathy with, the feelings of such owner.[30]

§ 1132. Insurance policies.—The general rule as to market value of the property, with interest, being the measure of damages, applies in cases of the conversion of a policy of life insurance. If, however, it appears that the policy has no market or trade value, damages may be assessed on the basis of the present value to the owner at the time of conversion.[31] If the insured be in good health and life insurable, the damages are to be assessed at the present value of the policy, less the present

Div. 577, wherein it was held that $2,500 damages was not excessive for conversion of buildings and fixtures which had cost $5,000.

[27] Greenbaum v. Taylor, 102 Cal. 624; 36 Pac. 957.

[28] Johnston v. Albany Dry Goods Co., 12 App. Div. (N. Y.) 608; 43 N. Y. Supp. 164.

[29] Hill v. Canfield, 56 Pa. St. 454.

[30] Bateman v. Ryder, 106 Tenn. 712; 64 S. W. 48. See 3 Parsons on Contracts (ed. 1893), 209, where the opinion is expressed that there can be no recovery for pretium affectionis in such cases unless the conversion was actually tortious, in which case the wrongdoer should be obliged to pay what he would have had to give if he had bought the article.

[31] Woodworth v. Hascall, 59 Neb. 124; 80 N. W. 483.

value of the cost in premiums it would require to procure another policy of like kind and value on the same life, taking into consideration in making the estimates of value the life expectancy tables.[32] But where, on account of the health of the insured under the converted policy, his life is noninsurable, the measure of damages is the full value of the policy at the time of conversion, with interest, this general rule, however, being subject to the modification, that if the person "is not insurable by reason of ill health or accident, that fact may be shown to reduce his expectancy. It may also be shown by experienced and expert insurance men that by reason of the ill health of the insured a greater rate of premium would be required to reinsure him on account of the shortened expectancy of his life. All these things may be given for the purpose of aiding the jury in determining his expectancy, and in this way determining the actual value of the policy at the time of its conversion, for if the insured's expectancy has been reduced in proportion to such reduction, the value of his policy has increased."[33] And where the policy has been deposited as a pledge, the measure of damages, for its conversion, will be the aggregate amount of the value of the original policy and the plaintiff's special damages, less the amount due to secure the payment of which the policy was pledged.[34] And again, where the company makes an unauthorized settlement with a guardian, by the payment to him of the portion of the amount due on a life insurance policy, the measure of damages, in an action for conversion against the company, is the balance of the principal sum due upon the policy with interest.[35] But where the policy was invalid and the company paid to the insured, a bankrupt, a certain sum as gratuity on consideration of his giving it up, the measure of damages, in an action by the assignee of the bankrupt, was held to be the value of the parchment only and not the sum gratuitously paid.[36]

§ 1133. Logs and lumber.—Subject to the exceptions else-

[32] Barney v. Dudley, 42 Kan. 212; 21 Pac. 1079; 16 Am. St. R. 476.

[33] Barney v. Dudley, 42 Kan. 212; 16 Am. St. Rep. 476; 21 Pac. 1079, per Clogston, C.

[34] Wheeler v. Pereles, 43 Wis. 332.

[35] Hayes v. Massachusetts Mut. L. I. Co., 125 Ill. 626; 1 L. R. A. 303; 18 N. E. 322.

[36] Wills v. Wells, 8 Taunt. 265.

where noted,[37] the measure of damages, for the conversion of logs or lumber, is the value of such property at the time of conversion,[38] and in the form in which it was when converted. So it has been decided that paving cedar, being an article of merchandise, the proper measure of damages is its value as such merchandise, and it is proper to exclude evidence of its value as firewood.[39] And where the plaintiff had agreed to cut and remove certain timber on defendant's land, within a certain time, but fails to remove some of the timber, within the time stipulated, and the defendant converts the same to his own use, the plaintiff may recover the market value of the timber; and it is no ground for the reduction of the damages resulting from the conversion that the act of the plaintiff, in leaving such timber on defendant's land beyond the time designated, constituted an actionable wrong, since the defendant could recover for such loss as he had sustained thereby, in an independent action.[40] Again, where a person contracts with the owner of land to cut ties from timber standing on such land and to pay to such owner all that he shall receive for such ties above a certain amount, in an action of trover against the owner for the conversion of the ties by an attachment and sale under a writ against the latter, the measure of damages is not the value of the ties, but the amount which the plaintiff was entitled to retain on a sale of the ties with interest.[41] The general rule, as to value at time and place of seizure with interest, applies in actions for conversion, either for seizure by attachment or by writ of sequestration.[42]

§ 1134. Logs—Double value for conversion of.—Under a statute providing that one who converts any logs lying in a

[37] See secs. 1121, 1122, herein.

[38] Tilden v. Johnson, 52 Vt. 628; 36 Am. Rep. 769, wherein it is declared by the court that the "rule of damages was the value of the logs at the time of their conversion. The action was brought to recover the value of the logs; it does not appear that the taking was wilful or malicious and the suit was not brought to recover for the lumber manufactured from the logs." Per Royce, J.

[39] La Chappelle v. Warehouse & B. Supply Co., 95 Wis. 518; 70 N. W. 589.

[40] Wyckoff v. Bodine (N. J.), 47 Atl. 23.

[41] Harvey v. Morse (N. H.), 45 Atl. 239.

[42] Norwood v. Interstate Nat. Bank, 92 Tex. 268; 48 S. W. 3, rev'g 45 S. W. 927.

river or "on or near the bank" of such river shall be liable for double their value,[43] one is not liable for such value where the logs converted by him are situated upon skidways, a considerable distance from the river bank.[44]

§ 1135. Mortgaged property.—The measure of damages, in an action by the owner of mortgaged property for a conversion of the same, is the value of the property, less the amount of the debt for which the mortgage was given as security.[45] And in an action by a mortgagor, against the mortgagee of chattels, for the conversion and sale of the same, evidence is admissible as to the price received by the mortgagee's agent who bid them off and afterwards resold them, as bearing on the question of value.[46] Again, in an action by the mortgagee of personal property for the conversion of the same, the measure of damages is the amount of his mortgage or lien on such property, not exceeding the value thereof,[47] to which may be added compensation for expenses incurred,[48] and, in California under the Code,[49] compensation for both time and expense.[50] And, in case of more

[43] See Sanb. & B. (Wis.) Ann. Stat. sec. 4449.

[44] Parkhurst v. Staples, 91 Wis. 196; 64 N. W. 882. In this case the logs were so situated about eighty feet from the river bank.

[45] Cocke v. Cross, 57 Ark.—; 20 S. W. 913; Becker v. Dunham, 27 Minn. 32. See also Jones v. Horn, 51 Ark. 19; 9 S. W. 309, wherein such was held to be the measure of damages together with an allowance for the amount due for rent to the mortgagee who had a landlord's lien on the property.

[46] Woods v. Gaar, 93 Mich. 143; 53 N. W. 14.

[47] Irwin v. McDowell, 91 Cal. 119; 27 Pac. 601; Peck v. Inlow, 8 Dana (Ky.), 192; West v. White, 165 Mass. 258; 43 N. E. 103; Ganong v. Green, 71 Mich. 1; 38 N. W. 661; Kasper v. Walla, 49 Neb. 288. 68 N. W. 476; Clark v. McDuffie, 49 N. Y. St. R. 535; 21 N. Y. Supp. 174; 46 N. Y. St. R. 535; 66 Hun (N. Y.); 629; Parish v. Wheeler, 22 N. Y. 494; Manning v. Monaghan, 28 N. Y. 285; Roberts v. Kain, 6 Rob. (N. Y.) 354; Cone v. Ivinson (Wyo.), 35 Pac. 933. But see Barry v. Bennett, 7 Metc. (Mass.) 354. In Showman v, Lee, 86 Mich. 556; 49 N. W. 578, where an action had been brought by the mortgagee of a drug stock for the conversion of same by attaching creditors of the mortgagor, it was held that the measure of damages was what it would cost to replace the stock at the time of seizure with a like stock and not the price which it would have brought at a forced sale, or what an occasional purchaser might have paid for same as a whole.

[48] Clark v. McDuffie, 49 N. Y. St. R. 535; 21 N. Y. Supp. 174.

[49] Cal. Civ. Code, secs. 3336, 3338.

[50] Irwin v. McDowell, 91 Cal. 119; 27 Pac. 601.

than one mortgage upon the property, the second mortgagee may recover the amount of his mortgage, provided the property is sufficient to pay both encumbrances,[51] and though the prior mortgage may be fraudulent or void, the recovery will be limited to such amount.[52] And in an action by the mortgagee of property against an officer, for conversion of the property by levy under process against the mortgagor, a judgment for nominal damages, in favor of the former, cannot be sustained where the property was released after action was commenced and there is no finding as to whether the property was taken back or not.[53]

§ 1136. Notes and commercial paper.—In an action for the conversion of commercial paper, the measure of damages is, prima facie, the amount expressed on the face of the paper or which appears from such paper to be unpaid, together with interest thereon.[54] The defendant, however, in such an action may show payment, or the insolvency of the parties thereto or some other fact invalidating the paper, such proof going in mitigation of damages.[55] And, in an action by the administrator of

[51] Schmittdiel v. Moore (Mich.), 79 N. W. 195; 6 Det. L. N. 144. See Chadwick v. Lamb, 29 Barb. (N. Y.) 518.

[52] Citizens Coal & C. Co. v. Stanley (Colo. App.), 40 Pac. 693.

[53] Irwin v. McDowell, 91 Cal. 119; 27 Pac. 601.

[54] Holt v. Van Eps, 1 Dak. Ter. 206; American Exp. Co. v. Parsons, 44 Ill. 312; Hersey v. Walsh (Minn.), 38 N. W. 613; Thomas v. Waterman, 7 Metc. (Mass.) 227; Bredow v. Mut. Sav. Inst., 28 Mo. 181; Menkens v. Menkens, 23 Mo. 252; Thayer v. Manley, 73 N. Y. 305; Potter v. Merchants Bank, 28 N. Y. 641; Booth v. Powers, 56 N. Y. 22; Walrod v. Ball, 9 Barb. (N. Y.) 271; Atkinson v. Rochester Print Co., 43 Hun (N. Y.), 167, aff'd 114 N. Y. 168; Loomis v. Mowry, 8 Hun (N. Y.), 311; Outhouse v. Outhouse, 13 Hun (N. Y.), 130; Thayer v. Manley, 8 Hun (N. Y.), 311; Ingalls v. Lord, 1 Cow. (N. Y.) 240; Brush v. Hibbard, 24 Barb. (N. Y.) 292; Cothran v. Hanover Nat. Bank, 8 J. & S. (N. Y.) 401; Seals v. Cummings, 8 Humph. (Tenn.) 442; Robbins v. Packard, 31 Vt. 570; Kalckhoff v. Zoehrlaut, 43 Wis. 373. See Rose v. Lewis, 10 Mich. 483. For the conversion of a bank bill a similar measure of damages prevails as in case of notes. Murray v. Pate, 6 Dana (Ky.), 335. See also Bradley v. Garvelle, 7 Minn. 331, wherein it was held that the facts that Sioux half-breed scrip was now assignable and not available in any other hands than of those persons named therein and that duplicates might be obtained could not be set up in defense to a suit against one wrongfully withholding such scrip from the owner.

[55] Atkinson v. Rochester Printing Co., 43 Hun (N. Y.), 167, aff'd 114 N. Y. 168; Booth v. Powers, 56 N. Y. 22; Walrod v. Ball, 9 Barb.

the payee of a note against the transferee of such note, the transfer being void because of the disability of the payee who had transferred it and who was an infant, the proper measure of damages was declared to be the amount of the note and interest, less such interest as had been paid to the payee on the note, and the value of necessaries furnished to her or money advanced and applied by her for the purchase of necessaries by the person to whom she had transferred it.[56] But evidence that the judgments obtained on notes were sold for their face value several months after their conversion is inadmissible on the question of damages.[57] In a case in New York, which was an action for the conversion of notes, and it appeared that the plaintiff had satisfied a judgment on such notes by surrendering real estate which had been previously transferred by him to his wife with no consideration, it was held that the measure of damages was the value of such property.[58] And where the defendant sold the note converted by him for less than its face value, it was held that a ruling by the court permitting a recovery of the amount actually received on such sale was not prejudicial to the defendant.[59]

§ 1137. Pledgor and pledgee—Collateral security.—For the conversion of personal property by a pledgee, who holds the same as security for the payment of some obligation on the part of the pledgor, the measure of damages is the actual value of the property,[60] less the amount due the pledgee to secure the payment of which the property was given as security,[61] with

(N. Y.) 271; Ingalls v. Lord, 1 Cow. (N. Y.) 240; Clark v. Cullen (Tenn. Ch.), 44 S. W. 204; Wolley v. Deseret Nat. Bank, 14 Utah, 305; 47 Pac. 147. See Hayes v. Massachusetts Mut. Ins. Co., 125 Ill. 626; 1 L. R. A. 306; Griggs v. Day, 136 N. Y. 152; 18 L. R. A. 120; 32 N. E. 612. See Rose v. Lewis, 10 Mich. 483. But see Stephenson v. Thayer, 63 Me. 143.

[56] Tillingham v. Holbrook, 7 R. I. 230.

[57] Wolley v. Deseret Nat. Bank, 14 Utah, 305; 47 Pac. 147.

[58] Hynes v. Patterson, 95 N. Y. 1, aff'g 28 Hun (N. Y.), 528.

[59] Nininger v. Banning, 7 Minn. 274.

[60] Griggs v. Day, 136 N. Y. 152; 18 L. R. A. 120; 48 N. Y. St. R. 853; 32 N. E. 612, rev'g 19 N. Y. Supp. 1019; 46 N. Y. St. R. 967, reh'g denied 137 N. Y. 542; 50 N. Y. St. R. 87; 32 N. E. 1001. See Leahy v. Lobdell (C. C. App. 6th C.), 80 Fed. 665; 54 U. S. App. 35, wherein it is held to be the sum finally realized upon the sale by the pledgee with interest.

[61] Franklin Bank v. Harris, 77 Md. 423; 26 Atl. 523; 8 Bkg. L. J. 477; Van Schaick v. Ramsey, 90 Hun (N. Y.), 550; 70 N. Y. St. R. 666.

interest in the discretion of the jury.[62] And the pledgor is not obliged to purchase an equal amount of similar property in order to fix the amount of damages.[63] But where commercial paper, unlawfully sold by the pledgee, was pledged for a larger amount than the face of the paper, nominal damages only are recoverable by the pledgor.[64] The value, it has been decided, is the value of the property at the time of the tender of the amount due the pledgee and of demand for the property.[65] In case, however, of there being no evidence of value at any time subsequent to the time when possession was given to the pledgee, evidence of value at such time is admissible for the purpose of estimating the damages.[66] And where an article has been pledged, which is new and has not been used, the damages may be assessed at its original cost where converted by the pledgee.[67] But where the security is an obligation of a third party, the pledgee may show the insolvency of the maker in reduction of the damages.[68] In an action by the bailee for the conversion by the bailor of property pledged with the former, the plaintiff may recover the value of the property, with interest, from the time of conversion, unless such sum is in excess of the amount due the plaintiff.[69]

§ 1138. Property in possession of trustee or assignee.—A trustee to whom property has been transferred for the benefit of creditors may, in an action for the conversion of the same, by an attaching creditor or by others, recover the full value of

[62] Franklin Bank v. Harris, 77 Md. 423; 26 Atl. 523; 8 Bkg. L. J. 477.

[63] Kilpatrick v. Dean, 3 N. Y. Supp. 60; 19 N. Y. St. R. 837, aff'd 4 N. Y. Supp. 708.

[64] Cole v. Dalziel, 13 Ill. App. 23.

[65] Franklin Bank v. Harris, 77 Ind. 423; 26 Atl. 523; 8 Bkg. L. J. 177; Hopper v. Smith, 63 How. Pr. (N. Y.) 34. As to value in case of stocks, see secs. 1146 *et seq.* herein.

[66] Lamb v. O'Reilly, 13 Misc. (N. Y.) 212; 68 N. Y. St. R. 114.

[67] Bell v. Ward, 81 Ill. App. 675.

[68] Griggs v. Day, 136 N. Y. 152; 18 L. R. A. 120; 48 N. Y. St. R. 853; 32 N. E. 612, rev'g 19 N. Y. Supp. 1019; 46 N. Y. St. R. 967, reh'g denied 137 N. Y. 542; 50 N. Y. St. R. 87; 32 N. E. 1001.

[69] Hays v. Riddle, 1 Sand. (N. Y.) 248. But see Sanger v. Henderson, 1 Tex. Civ. App. 412; 21 S. W. 114, wherein it is held that in an action by the trustee of goods in pledge for the benefit of third persons against an attaching creditor of the person creating the trust, the amount of debts secured by the pledge is not to be considered but that the plaintiff may recover the full value of the property.

the property,[70] without regard to the question as to whether such amount is necessary to pay off the debts of accepting creditors or not.[71] But where the property is bid in by or for the trustees for less than the actual value of the same, the measure of damages, in an action by the trustees for its conversion, will not be the full value thereof but the sum paid for the same at such sale.[72] But in an action by an assignee against an attachment creditor, there can be no recovery of counsel fees or expenses incurred by the former in a successful motion to vacate the attachment.[73] Nor is the fact that the assignee was prevented from selling the property, while the wrongdoer was in possession thereof, an element of damages.[74] And in an action for conversion against an assignee by one claiming under a conveyance from the debtor, if it be found that the conveyance was void as being a preference in payment of a pre-existing debt, cash which was paid by the plaintiff as a settlement of the difference between the amount of the debt and the value of the property covered by the conveyance, cannot be recovered by the plaintiff.[75] In case property held in trust, is fraudulently sold by the trustee, in an action by or in behalf of the cestui que trust, it has been held that the measure of damages is not limited to the value of the property at the time of sale, but there may be a recovery of the value at the time of demand with interest.[76]

§ 1139. Property purchased on credit.—Where property is sold on credit, only part of the purchase money being paid, or it is to be paid in installments, the measure of damages, for the conversion of such property in an action by the vendor, is the value of the property as fixed by the terms of the contract of sale with legal interest, less such amount as has already been paid thereon.[77] But in an action against a stranger, for the con-

[70] Robbins v. Fitz, 33 N. Y. 420.

[71] Schneider-Davis Co. v. Brown (Tex. Civ. App.), 46 S. W. 108.

[72] Baldwin v. Porter, 12 Conn. 473.

[73] Rambaut v. Irving Nat. Bank, 42 App. Div. (N. Y.) 143; 58 N. Y. Supp. 1056.

[74] Rambaut v. Irving Nat. Bank, 42 App. Div. (N. Y.) 143; 58 N. Y. Supp. 1056.

[75] Bartlett v. DeCreet, 4 Gray (Mass.), 111.

[76] Bell v. Bell, 20 Ga. 250.

[77] Ross v. McDuffie, 91 Ga.—; 16 S. E. 648; Arosemena v. Hinckley, 11 J. & S. (N. Y.) 43.

version of property after the payment of some of the installments by the vendee and a failure to pay the remainder, the vendor may recover the full value of the property with interest from date of conversion.[78] A purchaser of property on credit however, cannot, it is held, in an action against the vendor for the conversion thereof, recover the full value of the property in the absence of any allegations of facts which would entitle him to exemplary damages.[79] And for the conversion of stocks by the seller, which have been retained by the purchaser during the term of a period of credit, the measure of damages is the amount paid by him on the contract, with interest, where he treats the contract as rescinded.[80]

§ 1140. Purchaser from wrongdoer.—The measure of damages in an action of trover against an innocent purchaser from a wilful trespasser is the value of the property at the time of the purchase thereof by the former, and he is entitled to no reduction for work or labor of the wrongdoer which has been expended upon the converted property.[81] Thus where trees had been cut from land of the plaintiff by a wilful trespasser, and had been converted into ties and then sold to defendant, who was an innocent purchaser, it was held that the plaintiff was entitled to recover the value of the ties at the time of sale to defendant, with no allowance for the work and labor of the wrongdoer in cutting and removing the timber.[82] And in an action against a purchaser from one having the right to use property under a conditional sale, the measure of damages is the amount due at the time of the conversion, less an allowance for any de-

[78] Angier v. Taunton Paper Mfg. Co., 1 Gray (Mass.), 621.

[79] Washburn v. Corlis, 1 Misc. (N. Y.) 427; 50 N. Y. St. R. 563; 21 N. Y. Supp. 422.

[80] Leahy v. Lobdell (C. C. App. 6th C.), 80 Fed. 665; 54 U. S. App. 35.

[81] Central Coal & Coke Co. v. John Henry Shoe Co., 69 Ark.—; 63 S. W. 49; Wright v. Skinner, 34 Fla. 453; 16 So. 335; Cassidy v. Elk Grove Land & C. Co., 58 Ill. App. 39; Tuttle v. White, 46 Mich. 485; 41 Am. Rep. 175; Hoxsie v. Empire Lumber Co., 41 Minn. 548; 43 N. W. 476; Bolles Wooden Ware Co. v. United States, 106 U. S. 432; 27 L. Ed. 230. But see Railway Co. v. Hutchins, 37 Ohio St. 282; 32 Ohio St. 571; 30 Am. Rep. 629.

[82] Central Coal & Coke Co. v. John Henry Shoe Co., 69 Ark.—; 63 S. W. 49.

preciation of value by reason of the use of such property as is authorized under the contract of sale.[83]

§ 1141. Special interests in property—Generally.—One having a special interest in property against the owner or one claiming under him can, in an action for the conversion thereof, recover only the value of his special interest.[84] But in an action against a stranger for the conversion of property in the rightful possession of the plaintiff who has a special or part interest therein, the measure of damages will not be limited to the value of such interest, but there may be a recovery of the full value of the property converted.[85] In such a case, however, the damages recovered, in excess of the plaintiff's special interest, is held by the plaintiff for the benefit of the party or parties holding the remaining interest in the converted property.[86]

§ 1142. Vendor and purchaser.—A vendor of goods, who disaffirms the contract and sues in trover, may recover not the contract price but the actual value of such goods with interest.[87] And where under the terms of sale the vendor retains the title to the property until it is paid for, the measure of damages is the actual value of the property at the time of conversion with no allowance for payments made thereon.[88]

§ 1143. Vessels and boats.—The general rule as to the measure of damages being the value at the time of conversion, ap-

[83] Woods v. Nichols (R. I.), 45 Atl. 548.

[84] White v. Webb, 15 Conn. 302; Russell v. Kearney, 27 Ga. 96; White v. Allen, 133 Mass. 423; Fowler v. Haynes, 91 N. Y. 346; Spoor v. Holland, 8 Wend. (N. Y.) 445; Chadwick v. Lamb, 29 Barb. (N. Y.) 518; Heard v. Brewer, 4 Daly (N. Y.), 136. See also Washburn v. Cordis, 1 Misc. (N. Y.) 427; 50 N. Y. St. R. 563. And see Sunny South Lumber Co. v. Neimeyer Lumber Co., 63 Ark. 268; 38 S. W. 902.

[85] Guttner v. Pacific Steam Whaling Co., 96 Fed. 617; White v. Webb, 15 Conn. 302; Russell v. Kearney, 27 Ga. 96; Ullman v. Barnard, 7 Gray (Mass.), 554; Caswell v. Howard, 16 Pick. (Mass.) 562. See also Morris v. Burley (Iowa), 36 N. W. 882; Hill v. Larro, 53 Vt. 629.

[86] Schley v. Lyon, 6 Ga. 530; Chamberlin v. Shaw, 18 Pick. (Mass.) 278; Alt v. Weidenberg, 6 Bosw. (N. Y.) 177.

[87] Steven v. Low, 2 Hill (N. Y.), 132.

[88] Angier v. Taunton Paper Co., 1 Gray (Mass.), 621; Duncan v. Stone, 45 Vt. 118.

plies also in actions to recover for the conversion of boats and vessels. So in a Delaware case,[89] which was an action for the conversion of a vessel when about two thirds completed, and which the defendant completed at his own expense, the measure of damages was held to be the value of the vessel at the time of the conversion. It appeared in this case that the vessel was being built by one Tubbs for the defendant under contract, and that the latter had paid about two thirds of the contract price when the vessel was levied on by creditors of Tubbs. The latter delivered the vessel to defendant, in its unfinished condition, and in such condition it was sold at public sale, under executions and levies, to plaintiffs, who then made formal demand for the vessel and defendant refused to deliver it, claiming it as his property, and proceeded to have it completed at his own expense and then carried it away and converted it to his own use. And in a case in England, the following facts appear: A contracted with B, who was a shipbuilder, for the building of a vessel. A from time to time made several advances to B, who was also largely indebted to A upon a general consignment account. The vessel in its unfinished condition was subsequently transferred by B to A by a bill of sale. B also signed a builder's certificate and declaration of ownership in A, and obtained a certificate of registry in A's name which, however, he retained. Subsequently B obtained a cancellation of this certificate and the issuance of one in his own name, and executed an assignment of the vessel still unfinished to one C, who took possession of her, finished her, and sent her to Liverpool with a cargo on his own account. It was held that the bill of sale passed the vessel to A, and that C was liable in trover therefor. It was agreed that the damages be assessed by an average stater, and the court suggested that the damages be assessed as follows, to which the parties agreed: The measure of damages to be the value of the ship with all her stores at the time C took possession of her, and that to ascertain such value the referee should consider what would have been the value of the ship at Picton, the place of building, if she had been completed by B according to contract, deducting therefrom the amount that would have been necessarily ex-

[89] Green v. Hall, 1 Houst. (Del.) 506.

pended by B in completing her according to contract, after C took possession of her.[90] In the case of a conversion of a canal boat, it has been decided that the opinions of competent witnesses are admissible as to the value of the boat at various ports on the canal.[91]

§ 1144. Amount of damages not admitted by default.—The fact of a judgment by default and inquiry is not an admission of the amount of damages alleged in the complaint, in an action for conversion, but such amount must be determined upon proof.[92]

§ 1145. Evidence as to value.—Some evidence of value is essential to a recovery of substantial damages in an action of trover.[93] The failure, however, to move for a dismissal of the complaint on the ground that no such evidence has been given will not operate as a waiver of the objection that there is no evidence of value, since upon proof of the conversion plaintiff is entitled to nominal damages in any event.[94] Proof of the market value of the converted property is proper evidence of value.[95] And evidence of its value a short time before the conversion is sufficient, there being nothing to suggest a change in value in the meantime.[96] So again, the cost of the property when new is evidence of its value when evidence is also given showing its age and condition at conversion,[97] as is also evidence of the value of new articles of a similar kind where the property converted is substantially new.[98] And the price received for the property,

[90] Reid v. Fairbanks, 13 C. B. 692.

[91] Keller v. Paine, 34 Hun (N. Y.), 167.

[92] McLeod v. Mimocks, 122 N. C. 437; 29 S. E. 577.

[93] Cohnfield v. Walsh, 2 App. Div. (N. Y.) 190; 37 N. Y. Supp. 833; 73 N. Y. St. R. 448. See Sinnette v. Hoddick, 10 Misc. (N. Y.) 586; 64 N. Y. St. R. 30; 31 N. Y. Supp. 453.

[94] O'Neill v. Patterson, 26 Misc. (N. Y.) 3; 55 N. Y. Supp. 617.

[95] Moynahan v. Prentiss, 10 Colo. App. 295; 51 Pac. 94; Ellis v. Stine (Tex. Civ. App.), 55 S. W. 758. See Rollins v. State, 32 Tex. Crim. Rep. 566; 25 S. W. 125.

[96] McLennan v. Lemen (Minn.), 59 N. W. 628.

[97] Harvier v. Bell, 141 N. Y. 140; 56 N. Y. St. R. 674; 36 N. E. 6, aff'g 46 N. Y. St. R. 447; Prior v. Morton Boarding Stables, 43 App. Div. (N. Y.) 140; 59 N. Y. Supp. 287; Gleason v. Morrison, 20 Misc. (N. Y.) 320; 45 N. Y. St. R. 684, aff'g 20 Misc. (N. Y.) 4; Robinson v. Lewis, 6 Misc. (N. Y.) 37; 25 N. Y. Supp. 1004; 56 N. Y. St. R. 620.

[98] Morey v. Hoyt, 62 Conn. 542; 19 L. R. A. 611; 26 Atl. 127; 47 Alb. L. J. 310. See also Lewisohn v. Clenenger, 56 N. Y. St. R. 127, aff'd 148 N. Y. 728. But see Hauss-

at a bona fide fairly conducted private sale or public auction, is admissible on the question of value,[99] or evidence of the sum for which the property was sold by the defendant, under a bill of sale.[100] Again, the sum for which the property was insured by the express company, is admissible on this question in an action against it for conversion.[1] And it is not necessary to render evidence of value admissible that there be an allegation of value in the complaint.[2] And where, in an action for conversion, judgment has been entered against the defendant on a stipulation, it has been held that defendant is entitled to introduce evidence of value upon a subsequent assessment of damages, and is not confined to a cross-examination of plaintiff's witnesses.[3]

knecht v. Smith, 11 App. Div. (N. Y.) 185, dismissal of appeal denied in 151 N. Y. 658.

[99] Parmenter v. Fitzpatrick, 135 N. Y. 190; 48 N. Y. St. R. 80; 31 N. E. 1032, rev'g 38 N. Y. St. R. 367; Hangen v. Hochmeister, 21 J. & S. (N. Y.) 532, aff'd 114 N. Y. 566. See also Dalton v. Landahn, 27 Mich. 529.

[100] Kelly v. Mercantile & Traders Bank, 72 Hun (N. Y.), 158; 55 N. Y. St. R. 530. In this case it appeared that the bill of sale had been set aside for fraud.

[1] Girardeau v. Southern Exp. Co., 48 S. C. 421; 26 S. E. 711.

[2] Gleason v. Morrison, 20 Misc. (N. Y.) 320; 45 N. Y. Supp. 684, aff'g 20 Misc. (N. Y.) 4; 44 N. Y. Supp. 909.

[3] Duffus v. Bangs, 39 N. Y. St. R. 833.

CHAPTER XLVII.

CONVERSION OF PROPERTY OF FLUCTUATING VALUE.

§ 1146. Whether value at time of conversion or highest value at sometime thereafter is the measure of damages.
1147. Value at time of conversion—Arkansas—Colorado.
1148. Value at time of conversion—Illinois.
1149. Value at time of conversion—Iowa.
1150. Value at time of conversion—Kentucky — Maine — Maryland.
1151. Value at time of conversion—Massachusetts.
1152. Value at time of conversion—Michigan.
1153. Value at time of conversion—Mississippi—Missouri.
1154. Value at time of conversion—Nevada—New Hampshire.
1155. Value at time of conversion—Pennsylvania.
1156. Highest value to time of trial—Alabama — California.
1157. Highest value to time of trial—Florida—Georgia.
1158. Highest value to time of trial — North Carolina — North Dakota.
1159. Highest value to time of trial—South Carolina.
1160. Highest value to time of trial—Texas.
1161. Highest value to time of trial—Wisconsin.
1162. Highest value to time of trial—Wyoming.
1163. Highest value within reasonable time—United States supreme court.
1164. Highest value within reasonable time—Indiana.
1165. Highest value within reasonable time—New Jersey.
1166. Highest value within reasonable time—New York.
1167. Highest value within reasonable time—New York—Continued.
1168. Highest value within reasonable time—Oregon.
1169. Highest value within reasonable time—Tennessee.
1170. English decisions.
1171. English decisions—Continued.
1172. Canadian decisions.
1173. Summary of English and Canadian decisions.
1174. Summary of American decisions—General rules—Classification of states.
1175. Summary of American decisions—Classification as to property.
1176. Summary of American decisions — Weight of authority.
1177. Remarks—Generally.
1178. One argument for value at time of conversion—Criticism of.
1179. Remarks—Concluded — Extension of New York rule.

§ 1146. Whether value at time of conversion or highest value at sometime thereafter is the measure of damages.—As the decisions upon this question are not in harmony, and it is a subject involving much discussion in the various courts of this country, and in England, we have considered, in the following sections, the various decisions, both American and English, in which this question has arisen in actions for conversion, although our citations are not in all cases those where the action has been in trover. The question is certainly a difficult one. Formerly the rules were confined to two, namely, the value at time of conversion, and the highest intermediate value between time of conversion and time of trial. After this question had arisen many times in the courts of this country during many years of litigation, the New York courts, in which the rule of highest value up to the time of the trial had been the recognized rule, affirmed in many decisions, made an exception thereto in the case of stocks and established in cases of conversion of this class of property, the rule which may be known as the New York rule, and which provided that in such cases the highest value between time of conversion and a reasonable time after knowledge thereof, in which to replace the stocks, should be the measure of damages. This rule has since then been approved in the United States supreme court, and in several states. In the many cases, which we refer to in the following sections, may be found the growth and application of these different rules under the various state of facts in the particular cases and to the different classes of property.

§ 1147. Value at time of conversion—Arkansas—Colorado.—In Arkansas this question arose in an action to recover for the conversion of cotton, it being claimed that the jury were not properly instructed as to the measure of damages.[1] The instructions in substance were that the jury in estimating the damages were to assess them at the value of the cotton only at the time of its conversion and not its value at any other time, and this was declared to be a correct statement of the law in respect to the time the damages should have relation thereto.[2]

[1] Peterson v. Gresham, 25 Ark. 380.

[2] Citing Abraham v. Wilkins, 17 Ark. 292; Ingram v. Marshall, 23 Ark. 115; Wood v. Wylds, 11 Ark. 754; Burton v. Merrick, 21 Ark. 357; McNeill v. Arnold, 22 Ark. 477.

In Colorado, it is declared that the tendency of modern decisions is in support of the rule which fixes the measure of damages, in an action for the conversion of stock, at the value of the stock at the time of the conversion.[3] The court, however, in this case, simply declares what it considers the measure of damages in such actions and does not discuss to any extent the question of fluctuating values.

§ 1148. Value at time of conversion—Illinois.—In Illinois, in one of the first cases in which this question was directly under consideration by the court, the rule in that state was declared to be the current market value of the property at the time of the conversion with interest from such date to the time of the trial, there being no exception to or departure from such rule, though the property converted happened to be stocks.[4] Referring to the rule laid down by some courts as to the measure of damages, being the highest market value of the property converted in case such property happened to be stocks, it was said: "A majority of the court are unwilling to give our adherence to the doctrine of exception to the general rule of damages because the subject matter of the action happens to be stocks. . . . Stocks that cost the owner little or nothing, now and then advance to par and above. Suppose the owner of such stocks should pledge them when not worth ten cents on the dollar and the pledgee convert them. They cost the owner little or nothing. Circumstances arise however which enhance their value. By delaying his suit or the trial of it until those circumstances have had their full affect, the plaintiff by invoking the aid of the presumptions: (1) that he had parted with his money for the stock; (2) that he obtained the stock as a permanent investment; and (3) that it is to be presumed that he would have kept it until the time of the trial can elect to take the market value at the time of trial when each of these presumptions is as baseless as the fabric of a dream. Such a rule instead of being general, fixed and certain, is merely speculative, conjectural and dependent upon accidental circumstances. In Smith v.

[3] Continental Divide Min. Invest. Co. v. Bliley, 23 Colo. 160; 46 Pac. R. 633.

[4] Sturgis v. Keith, 57 Ill. 451; 11 Am. Rep. 28.

Dunlap,[5] this court said that 'legal rules ought to be general in their application so far as to embrace all cases depending on the same principles.' Believing that to be a sound doctrine, a majority of the court adhere to the general well established rule in this state viz.: that the proper measure of damages in an action of trover is the current market value of the property at the time of the conversion with interest from that time until the trial, and recognize no exception where the property converted happens to be stocks."[6]

§ 1149. Value at time of conversion—Iowa.—In Iowa, in an action of trespass for wrongfully entering and removing corn from the plaintiff's premises, the measure of damages was declared to be the market value of the corn at the time of its removal. The defendant claimed that the trial court erred in refusing to admit evidence of what such corn was worth to the plaintiff under an outstanding contract which he had for its delivery. But it was declared on appeal that "the general rule in respect to the measure of damages in cases of trespass upon real property when personal property is removed therefrom is the value of such personal property at the time of removal. . . . The market value of the corn taken or converted is the measure of damages and not what it might have been worth to the plaintiff under a particular contract which would yield him a profit over and above the value of the article, especially in the absence of knowledge of such contract by defendants."[7] In a case, which arose several years later in this state,

[5] 12 Ill. 184. This case was for breach of contract.

[6] Per McAllister, J. Many of the cases and authorities upon this subject are cited and reviewed in the opinion in this case. See also in this connection Galena & Southern Wisconsin R. R. Co. v. Ennor, 123 Ill. 505; Brewster v. Van Liew, 119 Ill. 554; 59 Am. Rep. 823; 8 N. E. 842; action for breach of contract by broker to hold stocks for a customer. Illinois Cent. R. R. Co. v. Cobb, Christy & Co., 64 Ill. 128; action against carrier for delay in transportation of goods. De Clerq v. Mungin, 46; Ill. 112 action in assumpsit to recover proceeds of sale of horse. Cushman v. Hayes, 46 Ill. 145; action in assumpsit for breach of contract by a warehouseman. Otter v. Williams, 21 Ill. 117; action for conversion of oxen. Smith v. Dunlap, 12 Ill. 184; action for breach of contract for sale of chattel. In these cases the general rule stated in the text is accepted as correct.

[7] Brown v. Allen, 35 Iowa, 306, per Miller, J.

the above decision was cited and approved.[8] This was an action for the conversion of cattle, upon which the defendant held a mortgage given by plaintiff to secure the payment of two notes which he gave to the defendant at the time of the purchase of the cattle. Before the notes became due defendant took possession of and sold the cattle, and in an action to recover therefor it was held that the measure of damages, in this case, was the difference between the price for which such property sold and the market value on the day of sale. The appellant claimed, in this case, that the measure of damages was the highest market value between time of conversion and time of suit and the court said: "The claim is not without strong support on authority if we say with appellant that the rule applicable to sales of personal property where the price is paid and there is a failure to deliver is applicable to this case. The rule of damage in cases of sales of property and a failure to deliver is differently applied in the United States. We might be disposed to consider the importance and correctness of the different rules but for the fact that this court has held to a rule in a case which on principle we think should govern in this. In Brown v. Allen,[9] the question arose as to the measure of damage for wrongfully entering a warehouse and removing corn. It is true the claim there was not like appellants claim here, but it involved the right of plaintiff to obtain more than the market value at the time of the conversion. The plaintiff in that case offered to show as affecting his damage that he had an outstanding contract for the corn in excess of the market value, which offer was refused and this court held to the rule of the market value at the time of the conversion. That is certainly a strong case in its facts for an extension of the rule, but this court said, 'the market value is the measure of damages.' There is certainly no reason for holding to such a rule in that case and a different one in this."[10] In actions for breach of contracts to deliver at a future date, goods paid for in advance, the measure of damages, in this state, is declared to be the highest market value between the time when such delivery should have been made and the time of bringing suit.[11]

[8] Gravel v. Clough, 81 Iowa, 272.
[9] 35 Iowa, 306.
[10] Per Granger, J.
[11] Gilman v. Andrews, 66 Iowa,

§ 1150. Value at time of conversion—Kentucky—Maine—Maryland.—In trover the value of property at the time of demand is declared to be the criterion of damages in Kentucky.[12] In this case the defendant sought to have evidence introduced as to the present value of the property, which the court refused to admit, and such refusal was held to be proper, as it would be unjust and contrary to law to permit defendant to use and diminish the value of such property and then obtain credit for that diminution against the plaintiff's recovery. In Maine, in an action for the conversion of stock, the measure of damages is the value of the stock at the time of the conversion together with any dividends received and interest thereon.[13] In Baltimore Marine Insurance Co. v. Dalrymple,[14] the action was instituted for the alleged illegal sale and conversion of certain shares of railroad stock and bonds, which had been pledged with defendant to secure the repayment of a loan. The declaration as originally filed contained a single count in trover, but was subsequently amended by adding certain counts in tort. The court declared, treating the case as an action of trover, they considered the rule well established that the proper measure of damages was the actual value of the stock at the time of the conversion, deducting of course the amount of the debt due the defendant by way of recoupment, and they further said that this was "the general rule in actions of trover and has been long recognized in Maryland."[15]

116; 23 N. W. 291; Myer v. Wheeler, 65 Iowa, 390; 21 N. W. 692; Stapleton v. King, 40 Iowa, 278.

[12] Lillard v. Whittaker, 3 Bibb. (Ky.) 92.

[13] Freeman v. Harwood, 40 Me. 195. See McKenney v. Haines, 63 Me. 74, which was an action in assumpsit for head of contract to return on demand stock borrowed by defendant from plaintiff. In this action it was held that the measure of damages was the market value of the stock on the day of demand with interest.

[14] 25 Md. 269. See Md. Fire Ins. Co. v. Dalrymple, 25 Md. 243.

[15] Citing Hepburn's Admr. v. Sewell, 5 H. & J. (Md.) 211; Sterling v. Garritee, 18 Md. 469. See also in addition to above cases, Baltimore City Pass. Ry. Co. v. Sewell, 35 Md. 238; 6 Am. Rep. 402, which was an action to recover damages for refusal to issue certificates of stock where it was held that the measure of damages was the value of the stock at the time of the demand together with any dividends paid or accrued and interest to day of trial. Third Nat. Bank v. Boyd, 44 Md. 47, which was an action on the contract of bailment where it appeared that certain bonds left with the defend-

§ 1151. Value at time of conversion—Massachusetts.—So far as we have been able to find, the question, as to what value should control in awarding damages, in an action of trover, first arose in this state in the case of Kennedy v. Whitwell.[16] Here an action of trover was brought for forty barrels of gin, sold by the defendants to the plaintiff, who, thirty days after the date of sale, demanded the gin and paid the price agreed upon, of about thirty cents per gallon, but the defendants refused to deliver it. The action was commenced on June 15th, and on November 11th, which was before the trial, the defendants resold the gin for about forty-six cents per gallon, cash. A verdict was rendered for the plaintiff by the jury, who assessed the damages at the value of the gin on March 22d, the date of the conversion, with interest from such date to time of trial, and this verdict was declared proper on appeal, the value of the article sued for at the time of the conversion being held to be the correct measure of damages. In the later case of Greenfield Bank v. Leavitt,[17] which was an action of trover for the conversion of money which had been entrusted with defendant, the court declared that "the general rule in trover that the measure of damages is the value of the articles at the time of the conversion with interest until the time of the verdict is established in this commonwealth."[18] And this rule was again declared to be the correct one in the case of Johnson v. Sumner,[19] which was in an action of trespass on the case for the wrongful taking and conversion of pine boards. Several years later in this state this question of value again arose in an action, by a principal against his factor, for a wrongful sale of property. The facts of the case were as follows: Tobacco had been sent by a principal to a factor who agreed to sell it for not less than forty cents per pound, and to hold it subject to the former's orders until sold at that price. The factor, however, did not sell it at the price above stated nor did he comply with his principal's orders in reference thereto and refused to return it

ant had been stolen, and the proper measure of damages was declared to be the value of the bonds at the time they were stolen.

[16] 4 Pick. (Mass.) 466.
[17] 17 Pick. (Mass.) 1.
[18] Per Putnam, J.
[19] 1 Metc. (Mass.) 172.

upon demand.[20] The words of the court in reference to the measure of damages in this case were as follows: "The presiding judge was requested to rule that if any tobacco was sold for less than forty cents the pound after the limit was imposed, the defendant would be responsible in damages only to the extent of the fair market value at the time it was sold. This he declined to do, except with modifications; and the rule of damages which he stated was in substance that the plaintiff might recover for the loss sustained by failure to obey his orders not exceeding forty cents the pound or the market value at the time when the return of the tobacco was demanded; but that the increase of market value up to forty cents the pound before the demand for a return was an item of damage. We perceive nothing in this rule of which the defendant can justly complain. The sale of the tobacco below the limit of their authority was a breach of their agreement and they cannot restrict the damages to the market value at that precise point of time. The injury may have consisted not in selling below the existing market price but in choosing a time for sale when the market was depressed and a favorable price could not be realized. The consignor had a right to insist that the goods should be held until his price could be obtained. We do not find it necessary to decide what rule of damages is absolutely correct. It has sometimes been said that the highest market price before action brought is the standard; at others that the highest value before the trial may be awarded. It is safe to say that the factor is at least liable for the highest market value of the goods within a reasonable time after a sale in violation of instructions. And in the present case there can be no doubt that the time when plaintiff demanded the return of the goods was soon enough after the defendant's disobedience of instructions to make the highest market price previous to that date a limit sufficiently favorable to defendants."[21]

[20] Maynard v. Pease, 99 Mass. 555.

[21] Per Foster, J. See the following cases, in this state, as bearing on this question of value: Fisher v. Brown, 104 Mass. 259, which was an action against broker for refusal to deliver shares of stock purchased in pursuance of contract with plaintiff. Market value on day of demand held to be measure of damages. Wyman v. American Powder Co., 8 Cush. (Mass.) 168; action in assumpsit for refusal to deliver certificates of stock. Value at time of demand held recov-

§ 1152. Value at time of conversion — Michigan.— In a late case in Michigan,[22] which was an action in trover for the conversion of a certificate of stock, the jury were instructed that the plaintiff was entitled to recover such damages as would compensate him for his loss, and that would be the price and value of the stock at the time he received notice of the loss thereof, together with all dividends paid to defendant, with interest from the date when its loss was made known to plaintiff. The defendant contended that this instruction did not correctly state the rule as to the measure of damages, but that the true measure was what it would have cost defendant to replace the stock within a reasonable time after knowledge of its conversion. The stock it appeared had depreciated considerably, within sixty days after the plaintiff knew of its conversion, it being three dollars per share at such time, and fell to two dollars and sixty cents per share within sixty days. Wright v. Bank[23] was cited, both by counsel for defendant and by the court, and reference was made to that part of decision, which held that the recovery in an action for conversion might be based on the highest price reached within a reasonable time after plaintiff has learned of the conversion, within which to go into the market and replace it. And the court said, applying the rule of that case "to the present case, we think the result reached would not give the plaintiff a less amount of damages than was allowed him under the rule adopted by the court in its charge to the jury. The conversion took place in 1884, but the plaintiff was not notified of it until the fall of 1886. At that time the value of the stock was three dollars per share; and if we adopt the rule contended for by defendant's counsel under the ruling of the court in Wright v. Bank, supra, at three dollars per share with interest upon this amount at six per cent upon dividends to which plain-

erable. Hussey v. Manufacturers & Mechanics Bank, 10 Pick. (Mass.) 414; action on case for refusing to issue certificates of ownership of stock; value at time of demand and refusal held recoverable. Gray v. Portland Bank, 3 Mass. 363; action on case for refusal to permit plaintiff to subscribe to stock of a bank. Held that damages should be assessed at value of stock at the time it should be transferred or delivered.

[22] Hubbell v. Blandy, 87 Mich. 209; 49 N. W. 502; 24 Am. St. Rep. 154. See in this connection Prentiss v. Ross, 96 Mich. 83; 55 N. W. 613.

[23] 110 N. Y. 237; 18 N. E. 79. See also sec. 1167 herein, where considered.

tiff would be entitled, the amount would be no less than the amount of the judgment actually rendered in the case. We therefore see no error in the case and the judgment must be affirmed."[24] The court in this case while not distinctly adopting the rule of reasonable time, yet seems to lean towards its adoption. The earlier cases, however, in this state uniformly hold that the measure of damages in actions for conversion is the value of the converted property at the time of the conversion. Thus it was so held in Jackson v. Evans,[25] which was an action for the conversion of wheat, it being declared, however, in this case, that allowance should be made for the cost of threshing and delivering it in market. And in an earlier case, which was also an action for the conversion of wheat which had been received in store to be paid when called for, it was held that the damages were to be based on the value of the property on the day of demand, and it was declared that any subsequent rise in value could not be considered.[26] And in a case prior to this, which was an action for the conversion of logs, it was held that it not being shown that the logs were sold for more than their real value, the measure of damages was the amount for which they were sold with interest from the date of conversion.[27]

§ 1153. Value at time of conversion—Mississippi—Missouri.—In Mississippi it is declared that in actions for the conversion of personal property, (1) "where no questions of fraud, malice, oppression (or wilful wrong either in the taking or detention) intervenes, the measure of damages is the value of the property at the time of the conversion with interest thereon to the time of trial, and this is a rule of law to be decided by the court;" (2) "that where the conversion is attended by circumstances of malice, fraud, oppression or wilful wrong, the law abandons the rule of compensation in a legal sense and the measure of damages becomes a matter for the consideration of the jury, guided by the evidence before them."[28] In Missouri the question as to the point of time, in estimating the value,

[24] Per Long, J.
[25] 44 Mich. 510; 7 N. W. 79.
[26] Bates v. Stansell, 19 Mich. 91.
[27] Symes v. Oliver, 13 Mich. 9.
[28] Whitfield v. Whitfield, 40 Miss. 352, per Harris, J., contains a thorough discussion of the subject and review of cases and authorities.

arose, in an action of trespass for selling plaintiff's property under execution against another, and it was held that, in the absence of any aggravating circumstances, the measure of damages was the value of the property at the time of the taking, with interest to the time of trial,[29] and the measure of damages in an action of trespass for personal property was declared by the court in this case to be the same as in an action of trover. The court said in this connection: "We remark here that the action of trespass for personal property without aggravating circumstances is to be regarded as one of trover in reference to the measure of damages. Some difference, however, exists in the courts as to the point of time to which we are to have reference in estimating the value of the property taken or converted. The rule of the English courts seems to be to leave it to the jury to select any time between that of the wrong done and the trial. . . . But in most of the American courts the reference is to the time when the injury was committed with interest, down to the trial. . . . In our own state it is believed the practice has been to estimate the value at the time the injury was committed, and to allow interest to the time of the trial, and we see no reason to disturb it and think it the correct rule."[30]

§ 1154. Value at time of conversion—Nevada—New Hampshire.—In Nevada, in an action for the conversion of mining stock, where a judgment had been rendered, based on the highest market price of the stock between the time of the conversion and the trial, it was held that the judgment was based upon a wrong theory and should be reversed, it being declared that the measure of damages should be "complete indemnity to the party injured, but no punishment to the wrongdoer. To accomplish this end all damages must be given which necessarily flow from the wrongful act. Those are the value of the property at the time of the conversion for that is what one has found and the other lost, together with damages for the detention of that value which is legal interest from conversion to judgment and in addition, any special damage which may legitimately arise out of matters in existence at the date of the tort."[31] In this

[29] Walker v. Borland, 21 Mo. 289.
[30] Per Leonard, J.
[31] Boylan v. Huguet, 8 Nev. 345, per Whitman, C. J.

state in the case of Frothingham v. Morse,[32] which was an action of assumpsit for money had and received, it appeared that the plaintiff had pledged gold coin as security for bail and the coin had subsequently risen in value. The court was requested by the plaintiffs to instruct the jury that they might assess damages equal in amount to the value of the gold on the day of the verdict, which request was refused, and it was held that there was no error in such refusal. The court said, referring to the damages recoverable if the action had been for conversion: "Again, if there had been a conversion of the gold by the attachment, the measure of damages in an action of trover would be its value at the time of such conversion.[33] Under our decisions then, in no form of action would the plaintiff be entitled to the value of the gold on the day the verdict was rendered; but the measure of damages in those cases where a greater sum than the nominal value might in any event be recovered, would be the value of the gold at the time it ought to have been returned. When that was is not stated, but of course it may be assumed that it was not on the day of the trial and therefore there could have been no error in declining to instruct the jury as requested, even had the action been trover."[34]

§ 1155. Value at time of conversion—Pennsylvania.—In a late case in Pennsylvania, where the action had been instituted for the conversion of certain shares of stock, the measure of damages was declared to be the highest market value of the stock at the time of the conversion.[35] And in an earlier case, which was an action of trover for the conversion of stock deposited by plaintiff with defendant as collateral, for margin on other stock which the plaintiff had directed defendant to buy

[32] 45 N. H. 545.

[33] Citing Pinkerton v. The Manchester & Lawrence Railroad, 42 N. H. 424, 457, which was an action of assumpsit, and it was here held that in case of an action to recover for the refusal to deliver a certificate to the purchaser of shares of stock sold on execution, there might be a recovery of the value of the stock at the time of the demand for such certificate with interest and not the value at the time of the trial or at any intermediate period.

[34] Per Bellows, J.

[35] Penn. Co. for Insurance v. Phila. Germantown & Norristown R. R., 153 Pa. St. 160; 25 Atl. 1043. See also Pennsylvania Co. v. Philadelphia, G. & N. R. Co. (Pa. C. P.), 1 Pa. Dist. R. 301; 11 Pa. Co. Ct. 482.

for him, the measure of damages was declared to be the market value of the stock at the time of conversion with interest, and the following charge to the jury was held to be error. "Finally in determining the amount of damages, I instruct you to take the highest value which the stock and bonds attained between the time of conversion and the bringing of the suit."[36] The court upon this point said: "It was decided by this court in Neiler v. Kelley,[37] just cited, that this rule for the measure of damages only applied where there is a duty or obligation devolved upon a defendant to deliver stocks or securities at a particular time, and that obligation has not been fulfilled. Thus if in the case before us, there had been a demand with the tender of the debt or a demand after payment of the debt, the rule laid down would have been applicable. But unless such a state of circumstances exists, the measure of damages is the market value of the stocks or securities at the time of the conversion with interest."[38] In the case of Neiler v. Kelley,[39] referred to above, an action of trover had been brought for the conversion of certain shares of stock. It appeared that the stocks converted had been pledged by the plaintiff with defendant as collateral for a debt, and that the debt being due, and not having been paid, the defendant sold them, without notice to the plaintiff, who had neither demanded them nor tendered payment. In this case the court said in its opinion: "The general rule as to the measure of damages in an action of trover undoubtedly is well settled to be the value of the goods at the time of the conversion, to which may be added interest up to the time of the trial, unless there were some circumstances of outrage in the case when the jury may give more."[40] This rule may be considered to have been, to some extent, modified as to stocks, railroad bonds and other securities of a similar nature.[41] The rule, however, is not changed, but only modified to this extent, that wherever there is a duty or obligation devolved

[36] Work v. Bennett, 70 Pa. St. 484.
[37] 69 Pa. St. 403.
[38] Per Sharswood, J.
[39] 69 Pa. St. 403.
[40] Citing Jacoby v. Laussat, 6 S. & R. 300; Dennis v. Barber, 6 S. & R. 420; Berry v. Vantries, 12 S. & R. 89; Taylor v. Morgan, 3 Watts, 333; Harger v. McManis, 4 Watts, 418.
[41] Citing Bank of Montgomery v. Reese, 2 Casey, 143; Reitenbaugh v. Ludwick, 7 Cases, 131; Peisch v. Quiggle, 7 P. F. Smith, 247.

upon a defendant to deliver such stocks or securities at a particular time, and that duty or obligation has not been fulfilled, then the plaintiff is entitled to recover the highest price in the market between that time and the time of the trial. The grounds of this exception are that such securities are limited in quantity, are not always to be obtained at any price, and are of a very fluctuating value. These are supposed to constitute sufficient reasons for the distinction. But it is plain that it has no application to the evidence in this case. The defendants below were at no time under any obligation to deliver these stocks and bonds specifically to the plaintiff. He never had put himself in a position to demand them before bringing the suit, or up to the time of trial by tendering or offering to pay the amount of his indebtedness to the defendants." [42] In one of the early cases in this state, which was an action to recover damages for a refusal to permit the plaintiff to subscribe his proper proportion of shares of a new issue of stock in a bank, the court considered the question as to what value should be a basis in estimating the damages in such an action, and we quote the following from the opinion in that case: "The paramount rule in assessing damages is that every person unjustly deprived of his rights should at least be fully compensated for the injury he sustained. Where articles have a determinate value and are unlimited in production, the general rule is to give their value at the time the owner was deprived of them with interest to the time of the verdict. This rule has been adopted because of its convenience, and because it in general answers the objects of the law which is to compensate for the injury. In relation to such articles the supply usually keeps pace with the demand, and the fluctuations in the value is so inconsiderable as to justify the courts in disregarding them for the sake of convenience and uniformity. In these cases the reason why the value at the time of conversion,

[42] Per Sharswood, J. See also the following cases in this state as to this question where it has arisen in other actions than trover: Nath v. Phillips, 89 Pa. St. 250. Action in assumpsit. Huntington & Broad Top R. R. & C. Co. v. English, 86 Pa. St. 247. Action in assumpsit. Wagner v. Peterson, 83 Pa. St. 238. Action in assumpsit. Laubach v. Laubach, 73 Pa. St. 387. Action in assumpsit. Smethurst v. Woolston, 61 Pa. St. 106. Action on the case. Musgrave v. Beckendorff, 53 Pa. St. 310. Action in assumpsit.

with interest, generally reaches the justice of the case is that when the owner is deprived of the articles, he may purchase others at that price. But it is manifest that this would not remunerate him where the article could not be obtained elsewhere, or where from restrictions on its production or other causes, its price is necessarily subject to very considerable fluctuations. The stock in a bank with a capital limited by law to a certain amount is an article of this description. If the bank be favorably located and well managed, the demand for its stock will increase rapidly, while on the other hand, the supply is restricted by law. A great increase in the price must be the necessary result. In such a case, the value at the time of conversion might be an insult instead of a compensation for a wrongful deprivation. Such a rule would hold out temptations to acts of wrongful conversion by making them profitable to the wrongdoer. If a bank or any other trustee might deprive the cestui que trust of his stock without answering for the rise in value, the beneficial owner would be deprived of the very advantage which he had in view when he made the investment. It is plain, therefore, that the ordinary measure of damages for the conversion or refusal to deliver chattels of determinate value and unlimited production will not reach the justice of the case when applied to the conversion of bank stock. On principle there is a distinction, and that distinction is well sustained by authority."[43]

§ 1156. Highest value to time of trial—Alabama—California.—In an action for the conversion of cotton it was declared by the court in Alabama that it "was competent to prove the highest price of cotton at any time between the date of conversion and the time of the trial as it was within the power of the jury in an action of trover to assess the damages of the plaintiff at a sum based on such price, or on a price not less than the value of the cotton at the date of conversion with lawful interest."[44] And in an earlier case in this state, it is held that

[43] Bank of Montgomery v. Reese, 26 Pa. St. 143, per Lewis, C. J. See Neiler v. Kelly, 69 Pa. St. 403, which distinguishes this case.

[44] Burks v. Hubbard, 69 Ala. 384, per Somerville, J., citing Ewing v. Blount, 20 Ala. 694; Jenkins v. McConico, 26 Ala. 213.

the measure of damages for the conversion of personal property may be fixed by the value of the property as proven at any time between the date of the conversion and the trial, though the jury are not bound to accept the highest value.[45] And in other prior decisions in this state, the same rule is declared the proper one for the jury in their estimation of damages.[46] In one of the first cases in California,[47] in which this question arose, it was declared that, in an action for the conversion of property which was of fluctuating value, the measure of damages was the highest value of the property at the time of its conversion or afterwards. The decision was cited and followed in a later case in this same state,[48] where it was, however, declared that some qualification of the rule might be necessary where there had been unreasonable delay on the part of the plaintiff in bringing suit, or under other special circumstances. In a later case, however, which was an action to recover damages for the conversion of crops, the rule was declared that, where the property converted was of a fluctuating value and exemplary damages were not allowed, the proper measure of damages is the highest market value within a reasonable time after the property was taken, with interest computed from the time such value was estimated.[49] But in a decision subsequent to this it was said that the measure of damages in actions for the conversion of personal property was prescribed by the Code,[50] in which it was declared that it was presumed to be "first, the value of the property at the time of the conversion with interest from that time; or where the action has been prosecuted with reasonable diligence, the highest market value of the property at any time between the conversion and the verdict without interest at the option of the injured party; and secondly, a fair compensation for the time and money properly expended in pursuit of the property."[51] And in a later case in this same state it was declared that reasonable diligence having been exercised by the plaintiff in bringing the action, which was one for the conversion of shares of stock, the plaintiff was entitled under the section of the Code

[45] Street v. Nelson, 67 Ala. 504.
[46] Loeb v. Flash, 65 Ala. 526; Tatum v. Maning, 9 Ala. 144.
[47] Douglass v. Kraft, 9 Cal. 562.
[48] Harner v. Hathaway, 33 Cal. 117.
[49] Page v. Fowler, 39 Cal. 412; 2 Am. Rep. 462.
[50] Cal. Civil Code, sec. 3336.
[51] Barrante v. Garratt, 50 Cal. 115.

above referred to, to "the highest market value of the property at any time between the conversion and the verdict, without interest."[52] If, however, the action is not prosecuted with reasonable diligence as prescribed by the Code, the plaintiff cannot, in this state, recover the highest value between time of conversion and time of trial, but the measure of damages in such case will be the value of the stock at the time of the conversion, with interest.[53]

§ 1157. Hightest value to time of trial—Florida—Georgia. —In Florida the rule is declared to be that "in actions for conversion where the subject of the action is ordinary merchandise and like property which is the subject of traffic or perishable property, the value at the time of the unauthorized act with interest is the proper measure of damages. In the case of public stocks held as an investment, of rare pictures, jewels and like articles, held otherwise than for purposes of immediate commerce, it would be equitable and proper that the highest value after conversion should prevail if the jury should be satisfied from the evidence that the plaintiff would have held the property up to the time of the advance in value, for the defendant should make good the actual loss sustained by reason of his act." The plaintiff in this case sued to recover for the conversion of a quantity of logs and in the charge to the jury the court had said, "Should you find for the plaintiff, you are allowed to value the logs at the highest valuation of logs from the time of conversion to the present time," and further charged at plaintiff's request, "If you find for plaintiff under the trover count, you may fix the value of the logs at the highest price that they were from the time of conversion till this date as shown by the evidence, and interest thereon," which was excepted to by defendant's counsel. On appeal the rule just stated in this section was declared by the court to be the correct one and it was held that the verdict was probably found in accordance with instructions given and the judgment was reversed and a new trial ordered.[54] In Georgia this question has been considered in an

[52] Fromm v. Sierra Nevada Silver Min. Co., 61 Cal. 629.

[53] Ralston v. Bank of Cal., 112 Cal. 208; 44 Pac. R. 476; 3 Am. & Eng. Corp. Cas. N. S. 622.

[54] Moody v. Caulk, 14 Fla. 50.

action brought to recover damages for the conversion of two mules. Upon the trial of the case the jury were instructed that the plaintiff might recover not only the highest value of the property from the time of its conversion to the time of the trial, but also the hire. This was held to be error, the court declaring that the plaintiff in such an action might elect what kind of a verdict he would take and that, if he elected to take the value of the property at the time of the conversion and the hire, he must prove the value of the property at the time of the conversion and at no subsequent time, and must also prove the value of the hire. If, however, he elected to take the highest value of the property between the time of the conversion and the trial, and proof was given to show such value, he was not entitled to hire or to interest.[55] But in an earlier case, which was an action for the conversion of slaves which had been sold by defendant, and which were therefore impossible for him to deliver, the plaintiff was held to be entitled in such a case to the value at the time of sale with interest thereon.[56]

§ 1158. Highest value to time of trial—North Carolina—North Dakota.—This question does not appear to have been directly before the court for its consideration in North Carolina, but in the case of Arlington v. Wilmington & Weldon R. R. Company,[57] which was an action on the case against the defendants as common carriers for failure to deliver an article at a certain market, to a factor who had been instructed not to sell until ordered, and the carrier delivered it to another factor at a different market, who had received no instructions as to selling and who sold it immediately, and it appeared that the article arose in value between the day of sale and the time of suit, it was held that the plaintiff was entitled to recover the highest market value between such dates, the suit having been brought within a reasonble time. In the opinion it was declared: "It is said those damages are vindictive and more than could have been recovered in trover and therefore ought not to be given in this action. It

[55] Jaques v. Stewart, 81 Ga. 81; 6 S. E. 815, citing Tuller v. Carter, 59 Ga. 395; Woods v. McCall, 67 Ga. 506; Ezzard v. Frick, 76 Ga. 512.

[56] Dorsett v. Frith, 25 Ga. 537.

[57] 6 Jones' Law, 68; 72 Am. Dec. 559.

is true that in trover for an actual conversion by a sale of the thing, the value at the sale is the measure of damages. But that arises from the form of the declaration which supposes the property to be changed by the sale and that there the injury and loss to the plaintiff was complete, and it has no application to an action on the case against a common carrier who tortiously carried goods to a wrong place and for immediate sale instead of delivering them at the right place, where they would have been sold at the pleasure and on the judgment of the owner at a higher price."[58] In North Dakota the damages in such cases is prescribed by the Code[59] as follows: "The detriment caused by the wrongful conversion of personal property is presumed to be: (1) The value of the property at the time of the conversion with the interest from that time; or (2) when the action has been prosecuted with reasonable diligence the highest market value of the property at any time between the conversion and the verdict without interest at the option of the injured party." In a case in which the question of damages in such an action arose, the court said, "This statute has been before us in two previous cases.[60] In Picket v. Rugg the court took occasion to call attention to the injustice which will necessarily follow, in many cases, by an application of the rule promulgated by the legislature in the section just quoted, by giving to the injured party not merely compensation for the injury he has suffered, but a right to recover the highest market value up to the time of the verdict, however fictitious that value may be. In the case at bar the recovery for the wheat converted bears no just relation to the damage which the plaintiff suffered. It is a misnomer to call it 'compensation.' It is largely punishment. But however averse we may be to the rule, it is the rule which governs; and the plaintiff has an absolute right to recover the highest market price if it so elects, provided only that it has prosecuted its action with reasonable diligence."[61] In an earlier

[58] Per Ruffin, J.

[59] N. D. Rev. Codes, sec. 5000.

[60] Picket v. Rugg, 1 N. D. 230; 46 N. W. 446; First Nat. Bank v. Minneapolis & N. Elevator Co., 8 N. D. 430; 79 N. W. 874.

[61] Per Young, J. That reasonable diligence where facts are not in dispute is for the court to determine is also held in this case.

case in this state a delay of eleven months in commencing the action, where unexplained, was held not to show such reasonable diligence as would entitle plaintiff to recover the highest market value provided for in the Code.[62]

§ 1159. Highest value to time of trial—South Carolina.—In an early case in South Carolina[63] it was declared by the court that "trover is an action sounding in damages, and the plaintiff is entitled to a full indemnity for the injury sustained by reason of the wrongful conversion of his property by the defendant. A person ought not to derive any benefit from his wrongful act; and where either party is to be injured by the casual rise or fall of property, it ought to be he who is in the wrong. The jury had a right, therefore, to give the highest value up to the time of the verdict."[64] In a later case in this state, which was an action for the conversion of a slave,[65] the plaintiff was permitted to recover the value of the property at the time of the conversion. The court said in this case, the defendant "is a wrongdoer and for his wrongful act the plaintiff has the right to demand compensation in damages either for the value of the property at the time of the conversion with hire to the death of the slave" (the slave having died while in defendant's possession) "or with interest to the trial; or for the value of the property at the time of the trial with hire from the conversion as may be most beneficial to him."[66] Again, where an action was brought for the conversion of several bales of cotton, it was held that where the thing converted had been reduced to money, the smallest measure of damages was the amount received from the conversion, with interest from the time thereof.[67] The question of highest market value is not discussed in this case but in a decision several years later, where an action had been brought for the conversion of cotton by a sheriff who had seized the same under legal process, the measure of damages was de-

[62] First Nat. Bank v. Minneapolis & Northern Elev. Co., 8 N. D. 430; 79 N. W. 874.

[63] Kid v. Mitchell, 1 N. & McC. (S. C.) 202; 9 Am. Dec. 702.

[64] Per Nott, J.

[65] Burney v. Pledger, 3 Rich. (S. C.) 191.

[66] Per O'Neill, J., citing Kid v. Mitchell, 1 N. & McC. 334; Hatton v. Banks, 1 N. & McC. 223.

[67] Ewart v. Kerr, 2 McMull. (S. C.) 141.

clared to be the highest market value of the cotton at any time, between the date of the seizure and the trial, with interest from the date of seizure.[68]

§ 1160. Highest value to time of trial—Texas.—In Texas, this question arose in an action to recover for the conversion of cotton which had been delivered to a party as bailee to be redelivered on demand, but which the bailee sold before any demand was made, and in fact the demand was not made for a period of about four years.[69] On the trial of the case the court, in substance, charged the jury that if they found the defendant had converted the property to his own use they should find for the plaintiff the highest market value of the cotton from the date of the demand to the time of the trial; and after finding the amount of cotton deposited and the market value as directed, they should credit the amount so found by the amount paid by defendant to plaintiff. This charge, on appeal, was held to be correct, and the judgment rendered upon the verdict of the jury was affirmed. Although in a later case, where an action was brought against a bailee for the conversion of cotton, the plaintiff's measure of damages was declared to be the value of the cotton at the time of the conversion, with interest from that time to the rendition of the judgment, it was, however, declared that the measure of damages was dependent upon "the peculiar circumstances of the case," so that it cannot be said to overrule the prior decision considered above.[70]

[68] Carter v. Dupre, 18 S. C. 179, citing Rogers v. Randall, 2 Spears, 38; Harley v. Platts, 6 Rich. 318.

[69] Stephenson v. Price, 30 Texas, 715.

[70] Hatcher v. Pelham, 31 Tex. 201. The facts of this case were as follows: Four bales of cotton were entrusted by the plaintiff to defendant as bailee with instructions to carry to a certain place and sell it for forty cents a pound in confederate money. The bailee failed to get the price required and deposited it in a warehouse and drew thirty-six cents per pound on it for his own use and the cotton was sold to indemnify this advance. The court instructed the jury to find the value of the cotton at forty cents per pound in confederate money and then to find the value of the confederate money which had been shown to be less than six cents on the dollar. The judgment was ordered reversed, the court holding that "under the peculiar circumstances of the case, we consider the jury should be instructed to ascertain the value of the cotton in lawful money of the

§ 1161. Highest value to time of trial—Wisconsin.—In an early case in Wisconsin,[71] which was an action to recover damages for the conversion of wood cut and piled on defendant's land with a view of selling it to defendant, the measure of damages was declared to be the value of the property at the moment of conversion, with such increase as it may have received from fluctuations of the market or other causes independent of the acts of the defendant. In a case decided in this state a few years later,[72] which was an action for trespass in cutting and removing timber, it was held that the highest market value of such timber, between the time of cutting the same and the time of trial, was the proper measure of damages. The court said in this case: "The timber may be cut by the wrongdoer when it is low and when the owner wishes it to stand in order to give him the benefit of a rise in the market. The value of the timber at the time of the trespass and interest thereon to the time of trial would not in that case give him compensation for the injury. And if one chooses to invade the rights and property of another he cannot complain if the owner waits for a rise in the market, and delays bringing his suit. Let him make good the loss he has caused such owner by his wrongful act or cease to interfere with the property of another."[73] While this case was pending a law[74] was passed in Wisconsin which provided that, in actions to recover damages for the wrongful cutting of timber, the plaintiff might recover the highest market value thereof, between the time of the cutting and the time of the trial, but it was declared that, as the case was pending when this statute was passed, it was not necessarily and absolutely

United States at the time defendant sold it." See the following cases in this state where the question of highest value has been considered: Heilbroner v. Douglass, 45 Tex. 403. Action for breach of contract to deliver goods; measure of damages based on value at time agreed on for delivery under circumstances of this particular case. Gregg v. Fitzhugh, 36 Tex. 127. Action for breach of contract to deliver goods; measure of damages value at place of delivery at any time between date agreed on and day of trial. This rule also laid down in Calvit v. McFadden, 13 Tex. 324, which was the same kind of an action. See also Randon v. Barton, 4 Tex. 289, action for breach of contract.

[71] Weymouth v. Chic. & N. W. Ry. Co., 17 Wis. 567; 84 Am. Dec. 763.

[72] Webster v. Moe, 35 Wis. 75.

[73] Per Cole, J.

[74] Laws, 1873, ch. 263.

controlling in that case. In a subsequent decision in this state this question is fully and thoroughly discussed and the doctrine of highest intermediate value is not approved of.[75] It was said by the court in this case: "It certainly cannot be said that this court has in any case decided that either in actions for the non-delivery of chattels according to agreement or in actions to recover damages for the conversion of the same, the plaintiff may recover as damages the highest market value of the chattels at any time intermediate the time when they should have been delivered according to contract, or the time when they were converted and the day of trial. On the other hand we think the uniform course of decision is that the measure of damages is the value of the property at the time fixed for the delivery or at the time of the conversion with interest to the day of trial; the only exception to the rule being that in case of replevin where the property is in esse and supposed to be in the hands of the defendant at the time of the trial, if plaintiff recovers he may recover as his damages the value of the property on the day of trial excluding any value added to the same by labor or money, of the defendant or those under whom he claims. . . . It is said that the rule giving as damages the highest market value intermediate the conversion, or day of delivery and the day of trial should be applied to articles of trade and commerce which fluctuate in value from day to day; and that to adhere to the rule of value at the time of the conversion would in many cases allow the wrongdoer to make profit out of his own wrong or at all events it might prevent the plaintiff from taking advantage of a rising market and thereby might deprive him of his reasonable expectations of profit from his investments. There can be no force in the argument that the defendant would be allowed to make money out of his own tortious act. If the wrongdoer sells the property which he has unlawfully taken from another, the owner of the property can waive the tort and sue the tort feasor for the money he has received upon such sale of his property and thereby prevent him from making a profit out of his wrong. But the rule which allows the plaintiff to recover the highest market value is objectionable because it allows him to recover speculative damages, especially when a long time elapses between the con-

[75] Ingram v. Rankin, 47 Wis. 407; 2 N. W. 755; 32 Am. Rep. 762.

version and the day of trial. In most cases property which rapidly changes in value is not retained in the possession or ownership of one person for a great length of time and it would be a matter of the utmost doubt whether the plaintiff, had he not been deprived of the possession of his property, would have realized the highest market value to which it might have attained during the time of the conversion and the time of the trial; and in those cases where the market value is very fluctuating great injustice would be done by this rule to the man who honestly converted such property in the belief that it was his own, if after the lapse of five or six years he should be called upon to pay the highest market value which it had attained during that time. . . . The difficulties and injustice of the rule of the highest market price has led to various modifications of it by the courts which have adopted it; some courts having so modified it as to confine it to the highest price between the date of the conversion and the commencement of the action; others to the time of commencement of the action, provided the action be commenced within a reasonable time; and others between the time of conversion and the time of trial, provided the action be commenced within a reasonable time. . . . The rule fixing the measure of damages in actions for breaches of contract for the delivery of chattels and in all actions for the wrongful and unlawful taking of chattels, whether such as would have formerly been denominated trespass de bonis or trover, at the value of the chattels at the time when delivery ought to have been made or at the taking or conversion with interest is certainly founded upon principle. It harmonizes with the rule which restricts the plaintiff to compensation for his loss and is as just and equitable as any other general rule which the courts have been able to prescribe, and has greatly the advantage of certainty over all others. We have concluded, therefore, to adhere to the general rule laid down by this court in the cases cited and hold that in all actions, either upon contract for the nondelivery of goods or for the tortious taking or conversion of the same, 'unless' in the language of Sedgwick above quoted, 'the plaintiff is deprived of some special use of the property anticipated by the wrongdoer,' and in the absence of proof, circumstances which would entitle the plaintiff to recover exemplary or punitory

damages, the measure of damages is, first, the value of the chattels at the time and place when and where the same should have been delivered, or of the wrongful taking or conversion with interest on that sum to the date of trial; second, if it appears that the defendant in case of a wrongful taking or conversion has sold the chattels, the plaintiff may at his election recover as his damages the amount for which the same were sold with interest from the time of the sale to the day of trial; third, if it appears that the chattels wrongfully taken or converted are still in the possession of the defendant at the time of the trial, the plaintiff may at his election recover the present value of the same at the place where the same were taken or converted in the form they were in when so taken or converted. These rules will prevent the defendant from making profit out of his own wrong, will give the plaintiff the benefit of any advance in the price of the chattels, when defendant holds possession of the same at the time of the trial, and on the whole will be much more equitable than the rule given by the court below."[76] The court in this case said that it did not intend to be understood as applying these rules to cases which came under provisions of the laws of 1873.[77]

§ 1162. Highest value to time of trial—Wyoming.—In Wyoming the rule prevails that, in an action to recover for the conversion of property of a fluctuating value, the plaintiff may recover the highest market price for the same that was paid at any time between the time of the conversion and judgment. This measure of damages was declared to be the correct one in an action for the conversion of railroad ties.[78] In this case the court said: "The English rule governs the court; according to that where the price or value of the converted property fluctuates between the conversion and the trial, it is held proper that the plaintiff should recover the highest market value which the property or like property had reached in its intended market during that interval; and this upon the twofold ground of making him good and of preventing the converter from profiting

[76] Per Taylor, J.

[77] Chap. 263 also referred to sec. 4269, Rev. Stat. 1878. This statute we have already referred to in this section.

[78] Hilliard Flume & Lumber Co. v. Woods, 1 Wyoming, 396.

from his own wrong; leaving it, however, to the jury to allow in its discretion the highest damages, under this principle or lower damages." [79]

§ 1163. Highest value within reasonable time—United States supreme court.—In a case which came before the United States supreme court this question also arose.[80] This was a suit brought by Jones, a stockbroker, to recover money claimed to be due on account of moneys advanced, purchases and sales of stocks and commission. Galigher, the defendant below, denied that any sum was due Jones, and further alleged that there was an agreement between them by which the purchases of stocks by Jones were to be on defendant's credit and were bought and to be held subject to defendant's order at all times, and that he had no authority to buy or sell stocks except by his order, and that, by reason of certain sales without any order from him, he lost by reason of subsequent advances in the price of such stocks certain specified sums. On the trial of the case the jury brought in a verdict for $5,412.50, for defendant, Galigher, which was set aside and new trial ordered. The case was again tried before a referee and a judgment given on his recommendation for the plaintiff for $7,028. This judgment was ordered reversed by the United States supreme court. Mr. Justice Bradley, who delivered the opinion of the court, said: "It has been assumed in the consideration of the case that the measure of damages in stock transactions of this kind is the highest intermediate value reached by the stock between the time of the wrongful act complained of and a reasonable time thereafter to be allowed to the party injured to place himself in the position he would have been in had not his rights been violated. This rule is most frequently exemplified by the wrongful conversion by one person of stocks belonging to another. To allow merely their value at the time of conversion, would in most cases afford a very inadequate remedy, and in the case of a broker holding the stocks of his principal, it would afford no remedy at all. The effect would be to give to the broker the control of the stock subject only

[79] Per Peck, J.

[80] Galigher v. Jones, 129 U. S. 200; 32 L. Ed. 658.

to nominal damages. The real injury sustained by the principal consists not merely in the assumption of control over the stock, but in the sale of it at an unfavorable time and for an unfavorable price. Other goods wrongfully converted are generally supposed to have a fixed market value at which they can be replaced at any time; and hence with regard to them the ordinary measure of damages is their value at the time of conversion or in case of sale and purchase at the time fixed for their delivery. But the application of this rule to stocks would, as before said, be very inadequate and unjust." The learned judge then proceeded to review briefly some of the authorities in this connection, among them the New York cases, and in reference to the New York decisions said: "The hardship which arose from estimating the damages by the highest price up to the time of trial which might be years after the transaction occurred, was often so great that the court of appeals of New York was constrained to introduce a material modification in the form of the rule, and to hold the true and just measure of damages to be the highest intermediate value of the stock between the time of its conversion and a reasonable time after the owner had received notice of it to enable him to replace the stock. . . . It would be a herculean task to review all the various and conflicting opinions that have been delivered on this subject. On the whole, it seems to us that the New York rule, as finally settled by the court of appeals, has the most reasons in its favor, and we adopt it as a correct view of the law. The judgment is reversed and the cause remanded to the supreme court of Utah with instructions to enter a judgment in conformity with this opinion."

§ 1164. Highest value within reasonable time—Indiana.—In a late case in Indiana, which was an action for the conversion of stock, it was declared that in estimating the damages the jury might determine the value of the stock converted on the basis of the highest intermediate value of such stock, between the time of conversion and a reasonable time after the owner had received notice of the conversion to enable him to replace the stock.[81] The court said: "There are conflicting

[81] Citizens St. Railroad Co. v. Robbins, 144 Ind. 671; 42 N. E. 916; 43 N. E. 649.

decisions as to whether the valuation shall be that prevailing at the time of the actual conversion or the highest price between the conversion and the demand, or the highest price between the conversion and the trial, or the highest intermediate value between the time of conversion and a reasonable time after the owner has received notice of the conversion to enable him to replace the stock. The latter we believe to be the correct rule, and especially is this true where the act of conversion is not wilful and fraudulent, but where, as here, it is without benefit to the party charged with conversion, but is from a mere omission to carefully observe the proceedings under which the purchase of the stock was claimed. . . . To adopt the value as existing at the time of actual conversion would enable the converting holder to make the market for the owner and deprive him of his stock whether he so wills or not. To adopt the highest value between the time of actual conversion and the trial is to encourage the owner to delay and speculate upon the chances of higher markets without assuming the chances of lower markets. If he know of the conversion and have a reasonable time in which to make himself whole by resorting to the markets, his loss is that which his stock should have yielded to that time and the value of the stock at that time, for he may then assume his position as a stockholder at a value to be charged to the defendant." [82] In an earlier case in an action for the conversion of wheat which the defendant sold, the court declared that the value of the wheat at the time of its sale by defendant "in the form in which he sold it was the measure of damages if the plaintiff was content therewith; though we think he was entitled to the highest price of the property at any time between the taking and the sale." [83]

§ 1165. Highest value within reasonable time—New Jersey.—The measure of damages, in an action for the conversion of stocks and bonds, which are commercial securities of fluctuating value in the market, is not the market value at the time of conversion or the highest value, between the time of conversion and the time of trial, but the highest intermediate

[82] Per Hackney, C. J.

[83] Ellis v. Wise, 33 Ind. 127; 5 Am. Rep. 189, per Frazer, J.

market value between the time of conversion and a reasonable time after notice of the conversion within which to replace the securities.[84] "The principle upon which this doctrine rests is the consideration that the general rule in an action for a conversion, the market value of the property at the time of the conversion would afford an inadequate remedy or rather no remedy at all, for the real injury which consisted in the wrongful sale of property of fluctuating value at an unfavorable time chosen by the broker himself. Hence the cost of replacing the securities by a purchase in the market, allowing a reasonable time for that purpose, has been regarded as the proper measure of damages. . . . The general rule that the market value at the time of the conversion is the measure of damages being found to be impracticable in these cases, and having been abandoned, the effort has been to obtain some rule by which substantial justice, as near as may be, may be obtained. . . . But where stocks and negotiable securities are pledged as collateral security for the payment of a debt to become due and payable on a future day, another element enters into the consideration of the compensation to be awarded the owner of the securities for the unauthorized sale of them before the debt matures. Upon such a bailment it is the duty of the pledgee to keep the securities in hand at all times ready to be delivered to the pledgor on the payment of the debt. An unauthorized sale before the debt matures is a conversion for which the pledgor may have remedy in the manner above mentioned. But the sale may be made when the market value is depreciated and the market with a downward tendency; "the market may revive and the prices be enhanced before the debt matures. Under such circumstances a rule that the pledgor shall be at liberty to elect to treat the unauthorized sale as a conversion, or to hold the pledgee for the breach of his duty to keep the securities until the maturity of the debt and

[84] Dimock v. United States Nat. Bank, 55 N. J. L. 296; 39 Am. St. Rep. 643; 25 Atl. 926. This was an action on a note, secured by the pledge of stocks and bonds, as collateral security for its payment. The securities were sold, after a demand for payment not made in strict conformity with the contract, and the defendant claimed damages by way of recoupment for the unauthorized sale as for a conversion.

recover as damages the market value of the securities as of that time, would commend itself in reason and justice."[85]

§ 1166. Highest value within reasonable time—New York.—In New York the rule formerly prevailed that, for the conversion of property of fluctuating value, the measure of damages was the highest value of the property between the time of conversion and time of trial. So, in one of the earlier cases, it is declared that where stocks are bought on margin, the legal relation of the parties is that of pledgor and pledgee and, in an action for conversion thereof, the measure of damages is the highest market value between the time of the conversion and the trial.[86] But in Matthews v. Coe,[87] it was declared by the court that the rule giving the plaintiff in all cases, in an action for the conversion of property of fluctuating value, the highest market value, between the time of conversion and time of trial, could not be upheld on any sound principle of reason and justice, and that the rule was not so firmly settled as to be beyond the reach of review whenever the occasion might render it necessary. And in Baker v. Drake,[88] the intimation, given in the preceding case, that the rule of damages above stated might be reviewed was carried out. This case was an action for the conversion by defendants, who were stockbrokers, of five hundred shares of railroad stock which had been purchased by them for plaintiff, and the rule recognized in past decisions was reversed. In this case the court said: "If upon being informed of the sale he desired further to prosecute the adventure and take the chances of a future market, he had the right to disaffirm the sale and require the defendants to replace the stocks. If they failed or refused to do this, his remedy was to do it himself and charge them with the loss reasonably sustained in doing so. The advance in the market price of the stock from the time of the sale up to a reasonable time to replace it after the plaintiff received notice of the sale, would afford a complete indemnity. Suppose the stock, instead of advancing, had de-

[85] Per Depue, J.

[86] Markham v. Jandon, 41 N. Y. 237 (Grover & Woodruff, JJ., contra.), citing Romaine v. Allen, 26 N. Y. 309; Scott v. Rogers, 31 N. Y. 676; Burt v. Dutcher, 34 N. Y. 493. See also Groat v. Gile, 51 N.Y. 431; Matthews v. Coe, 49 N. Y. 57.

[87] 49 N. Y. 57.

[88] 53 N. Y. 211.

clined after the sale, and the plaintiff had replaced it or had full opportunity to replace it a lower price, could it be said that he sustained any damage by the sale; would there be any justice or reason in permitting him to lie by and charge his broker with the result of a rise at some remote subsequent period. . . . But the rule adopted in Markham v. Jandon, passing far beyond the scope of a reasonable indemnity to the customer whose stocks have been improperly sold, places him in a position incomparably superior to that of which he was deprived. It leaves him with his venture out for an indefinite period, limited only to what may be deemed a reasonable time to bring a suit and conduct it to its end. The more crowded the calendar and the more new trials granted in the action, the better for him. He is freed from the trouble of keeping his margins good and relieved of all apprehension of being sold out for want of margin. If the stock should fall or become worthless, he can incur no loss, but if at any period during the months or years occupied in the litigation, the market price of the stock happens to shoot up, though it be but for a moment, he can at the trial take a retrospect and seize upon that happy instant as the opportunity for profit, of which he was deprived by his transgressing broker, and compel him to replace with solid funds this imaginary loss."[89] This case contains an exhaustive review of all the prior decisions in this state relating to this subject. It is also stated that different considerations might arise if the stock had been paid for and owned by the plaintiff.[90] The rule declared in this case to be the correct one was subsequently followed by the court in Gruman v. Smith.[91]

§ 1167. Highest value within reasonable time—New York—Continued.—In Harris v. Trumbridge,[92] it appeared that plaintiff had purchased through the agency of the defendant a stock option or a privilege, known in the language of brokers as a "straddle," by which she was entitled to demand of the seller

[89] Per Rapallo, J.

[90] But on this point see Wright v. Bank of the Metropolis, noted subsequently in this section.

[91] 81 N. Y. 25, citing above case.

[92] 83 N. Y. 92; 38 Am. Rep. 398.

a certain number of shares, at a stated price, or to require him to take such shares at the same price within sixty days. The day after the purchase, the defendant sold the shares short at a loss to plaintiff. The court said: "It is insisted that as plaintiff never gave any directions to 'put' or 'call' the stock, she should not have recovered as if she had. But in the absence of such directions, it was defendant's duty, under the circumstances of this case, as we have already said, to have closed the 'straddle' contract by exercising the option at the most favorable time, and to have acted for her in that respect with reasonable care and skill. As he did not do so, she is entitled to recover what she has lost by his neglect, and the price of the stock from day to day during the running of the option, having been shown, it was for the jury to determine that amount."[93] But in a later case in New York, where it appeared that upon the guaranty of a third party, defendants agreed to carry stocks for plaintiff for a period of six months, unless instructed by him to sell before such time, and, the guaranty being withdrawn, defendants notified plaintiff that, unless he deposited a margin with them within a certain time, they would close out the stock, which they did upon his failure to deposit such margin, and the plaintiff did not replace the stock within a reasonable time, which he could have done for a period of thirty days at the same or for a less figure, his recovery was limited to nominal damages.[94] The rule declared to be the proper one in Baker v. Drake[95] was again followed in a later case in New York,[96] and it may now be said to be the established rule in this state. In this case, however, the court extended the application of the rule beyond the limits defined in Baker v. Drake,[97] and included those cases both where the stock was held on margin for the plaintiff, and where it was bought and owned by him, it being declared, in the earlier decision, that different considerations might arise where the stock was paid for and owned by the plaintiff. Referring to the rule and its application the court,

[93] Per Finch, J.

[94] Colt v. Owens, 90 N. Y. 368, citing Baker v. Drake, 53 N. Y. 211; 13 Am. Rep. 507.

[95] 53 N. Y. 211.

[96] Wright v. Bank of the Metropolis, 110 N. Y. 237; 6 Am. St. Rep. 356; 18 N. E. 79; 18 N. Y. St. R. 92; 1 L. R. A. 289.

[97] 53 N. Y. 211.

said that the broker's duty "in each case is to replace the stock upon demand and in case he fails to do so, then the duty of the plaintiff springs up and he should repurchase the stock himself. This duty it seems to me is founded upon the general duty which one owes to another who converts his property under an honest mistake to render the resulting damage as light as it may be reasonably within his power to do. "Now so far as the duty to repurchase the stock is concerned, I see no difference in the two cases. There is no material distinction in the fact of ownership of the whole stock which should place the plaintiff outside of any liability to repurchase after notice of sale and should render the defendant continuously liable for any higher price to which the stock might rise after conversion and before trial. As the same liability on the part of the defendant exists in each case to replace the stock, and as he is technically a wrongdoer in both cases, but in one no more than in the other, he should respond in the same measure of damages in both cases and that measure is the amount, which in the language of Rapallo, J., is the natural, reasonable and proximate result of the wrongful act complained of, and which a proper degree of prudence on the part of the plaintiff would have averted. The loss of a sale of the stock at the highest price down to the trial would seem to be a less natural and proximate result of the wrongful act of the defendant in selling it when plaintiff had the stock for an investment, than when he had it for a speculation for the intent to keep it as an investment is at war with any intent to sell at any price, even the highest. But in both cases the qualification attaches that the loss shall be such as a proper degree of prudence on the part of the complainant would not have averted and a proper degree of prudence on the part of the complainant consists in repurchasing the stock after notice of its sale and within a reasonable time. If the stock then sell for less than defendant sold it for, of course the complainant has not been injured, for the difference in two prices inures to his benefit. If it sell for more, that difference the defendant should pay. . . . It is the natural and proximate loss which the plaintiff is to be indemnified for and that cannot be said to extend to the highest price before trial, but only to the highest price reached within a reasonable time after the plaintiff has

learned of the conversion of his stock within which he could go in the market and repurchase it. What is a reasonable time when the facts are undisputed and different inferences cannot reasonably be drawn from the same facts is a question of law."[98] In one case in New York, the question as to the measure of damages for the conversion of wheat arose and it was declared that, in the absence of special circumstances, the value of the wheat at the time of conversion furnished the rule of compensation.[99]

§ 1168. Highest value within reasonable time—Oregon.—In Oregon, in such actions, the better rule is declared to be the assessment of damages based on the value of the stock at the time of the conversion or a reasonable time thereafter, subject, however, to some exceptions, one of which is that, if there has been only a technical conversion without any pecuniary loss, then the recovery should be limited to nominal damages.[100]

§ 1169. Highest value within reasonable time—Tennessee.—In a late case in Tennessee[1] this question arose, in an action brought by Morris for a settlement and accounting of partnership transactions, in which it was claimed that there had been a conversion of certain stocks by defendant. It was claimed by plaintiff that the measure of damages, in such a case, was the highest value of the stocks, between the date of conversion and the commencement of the suit. As to this claim the court said, "We do not think complainant's contention is well grounded . . . but as will be seen, the result is the same under the true rule." The court, after distinguishing a few of the cases, proceeded to quote the greater part of the opinion of the supreme court of the United States in Galigher v. Jones,[2] and said: "So that whether the rule be as insisted by the complainant, or whether we adopt the rule as laid down by the supreme court of

[98] Per Peckham, J.

[99] Mechanics & Traders Bank v. Farmers & Mech. Nat. Bank, 60 N. Y. 40.

[100] Budd v. Multnomah St. Ry. Co., 15 Oreg. 413; 15 Pac. 659; 3 Am. St. Rep. 169. This was an action for the conversion of corporate stock.

[1] Morris v. Wood (Ct. of Chanc. App. 1896), 35 S. W. 1013.

[2] 129 U. S. 200, 202; 9 Sup. Ct. 335. See sec. 1163 herein, where this case is fully considered.

the United States in Galigher v. Jones, supra, the result is the same in the present case.[3] We think, however, in a question of this kind, in laying down the rule, it is safest and wisest to follow the concurrent views of the court of appeals of New York, and the supreme court of the United States, considering the fact, not to mention the other weighty reasons that are stated by the court in Galigher v. Jones, supra, there are perhaps more transactions of this kind—that is in stocks—in the state of New York than in all other parts of the country. Our own supreme court not having declared itself upon the subject, we are at liberty to adopt the above mentioned rule."[4]

§ 1170. English decisions.—One of the earliest reported cases in England, in which the question of highest value was considered, was that of Forrest v. Elwes,[5] decided in 1799. In this case it appeared that a transfer of stock had been made by way of a loan, with a condition to replace the same six months after date, but the stock was not replaced and had depreciated in value. The plaintiff was held to be entitled to recover the value of the stock at the time of the transfer, with interest. It was said by the master of the rolls, in this case, referring to the above measure of recovery, "The master has thought that fair, and I do not know how a jury could adopt a better rule. If an action had been brought recently upon the breach of the agreement and the stock had risen, no doubt the jury would by way of damages have given the rise and would not have confined it." This question again arose three years later in a case,[6] which was also an action to recover damages for breach of an engagement to replace stock on a given day, and it was declared in this case, that "the true measure of damages in all these cases is that which will completely indemnify the plaintiff for the breach of the engagement. If the defendant neglect to replace the stock at the day appointed and the stock afterwards rise in value, the plaintiff can only be indemnified by giving him the price of it at the time of the trial. And it is no answer to say that the defendant may be prejudiced by the plaintiff's de-

[3] The highest value of the stock was the same in both periods.

[4] Per Nell, J.

[5] 4 Ves. 492.

[6] Shepherd v. Johnson, 2 East. 211.

laying to bring his action, for it is his own fault that he does not perform his engagement at the time; or he may replace it at any time afterwards so as to avail himself of a rising market."[7] In the case of McArthur v. Seaforth, decided in 1810,[8] which is an action similar to the above, it was held that plaintiff might at his option elect to take the price at the day when it ought to have been replaced or the price at the day of the trial, but not the highest price at any intermediate day. Subsequently in Downes v. Back,[9] which was again an action on a bond conditioned for the replacing of stock on a particular day, and in which it was alleged by way of breach that the defendant had not replaced the stock and it appeared that on the day specified for replacing the same, the value was fifty-seven pounds and that on the day of trial it was sixty-three pounds, it was held, by Lord Ellenborough, that the plaintiff was entitled to claim according to the value upon the day of the trial. We also note here the case of Mercer v. Jones,[10] which has been frequently cited in this connection. This, however, was an action to recover for the conversion of a bill of exchange, and Lord Ellenborough said, "In trover the rule is that the plaintiff is entitled to damages equal to the value of the article converted at the time of the conversion," and a verdict was directed by him for the amount of the bill with interest. It will be noticed that in this case the property converted was a bill of exchange, which would ordinarily be subject to the general rule of value at time of conversion. Another case which has also been cited in this connection is that of Gainsford v. Carroll, decided in 1823,[11] which was an action of assumpsit for not delivering goods on a certain day. In this case it was declared that the true measure of damages, in such an action, is the difference between the contract price and that which goods of a similar quality and description bore on or about the day when the goods ought to have been delivered.[12] These cases were followed in 1825 by that of Greening v. Wilkinson,[13] which was an action of trover for warrants of cotton. It was here held that the measure of damages

[7] Per Grose, J.
[8] 2 Taunt. 257.
[9] 1 Starkie, 318 (decided in 1816).
[10] 3 Camp. 477.
[11] 2 B. & C. 624.
[12] Upon this point see secs. 1621 et seq. herein.
[13] 1 C. & P. 625, decided in 1825.

was not limited to the value of the cotton at the time of the conversion, but that damages might be awarded, based on the value at any subsequent time in the discretion of the jury. It was said in this case: "I think that case [14] is hardly law and that the amount of damages is for the jury, who may give the value at the time of the conversion or at any subsequent time in their discretion, because the plaintiff might have had a good opportunity of selling the goods if they had not been detained. I am therefore of opinion that the price of the article on the day of the conversion is by no means the criterion of the damages. It may be said that if he had wanted cotton he might immediately have bought more at that day's price as soon as he found that this cotton was detained from him; but then to do that he must have had the money which he might not have ready on the very day of the detention nor on any day after till the price had risen; and my opinion is that the jury are not at all limited in their verdict by what was the price of the article on the day of the conversion." [15] In another case, decided several years later,[16] where it appeared that there was a fraudulent transfer of stocks owned by one T. to certain parties, to whom certificates of stock were given by the company, and who in turn subsequently sold and transferred such shares to one A., it was ordered by the court that T.'s name be restored by the company to its register as holder of the shares, and it was held that A. was entitled to recover the value of the shares at the time the company first refused to recognize him as a shareholder, with interest.

§ 1171. English decisions—Continued.—The case of France v. Gaudet, decided in 1871,[17] was an action for the conversion of champagne which the plaintiff had purchased while it was lying at defendant's wharf. The purchase price was fourteen shillings per dozen and it was resold at twenty-four shillings per dozen. The plaintiff was, however, unable to fulfill his contract of sale because of defendant's refusal to deliver it and

[14] Referring to Mercer v. Jones, 3 Camp. 477.

[15] Per Abbott, C. J.

[16] In re The Bahia & San Francisco Ry. Co., Ltd., et al., L. R. 3 Q. B. 584 (decided 1868).

[17] L. R. 6 Q. B. 199.

his inability to procure other champagne of a similar quality. Though the defendants had no knowledge of the resale or of the purpose for which the plaintiff required its delivery, it was held, in an action for conversion, that the plaintiff was entitled to recover, as damages, the price at which he had sold the champagne. In this case it was said by the court: "Under ordinary circumstances the direction to the jury would simply be to ascertain the value of the goods at the time of the conversion, and in case the plaintiff could by going into the market have purchased other goods of the like quality and description, the price at which that would have been done would be the true measure of damages. It was, however, admitted on the trial that in the present case that course could not have been pursued, inasmuch as champagne of the like quality and description could not have been purchased in the market so as to enable the plaintiff to fulfill his contract with Captain Hodder. We are of opinion that the true rule is to ascertain the actual value of the goods at the time of the conversion and that a bona fide sale having been made to a solvent customer at twenty-four shillings per dozen, which would have been realized had the plaintiff been able to obtain delivery from the defendants, the champagne had, owing to these circumstances, acquired an actual value of twenty-four shillings per dozen; and we think that in the present case that ought to be the measure applied and that a jury would not only have been justified in assuming that to be the value but ought, where the transaction was bona fide, to have taken that as the measure of damages, and under the reservation at the trial we think we ought to say that such is the proper measure of damages. It was, however, objected at the trial in analogy to the cases of special damage arising out of the breach of contract that notice of the special circumstances ought to have been given to the defendants in order to entitle the plaintiff to recover anything beyond the ordinary value of the goods converted. . . . We are not prepared to say that there is any analogy between the case of contract alluded to in which two parties making a contract for the sale and delivery of a specific chattel, the vendee gives notice to the vendor of the precise object of the purchase and a case like the present. In the case of contract special damages, reasonably resulting from the breach of it, may

be considered within the contemplation of the parties. In trover it is not in general special damage which can be recovered but a special value attached by special circumstance, to the article converted; the conversion consists in withholding from another property to the possession of which he is immediately entitled and the circumstances which affix the value are then determined; no notice to the wrongdoer could then affect the value, although it might affect his conduct; but upon what principle is a notice necessary to a man who ex hypothesi is a wrongdoer? In such a case as the present the actual value is fixed by circumstances at the time of the demand, and no notice of the special circumstances could then affect the actual value of the goods withheld from their rightful owner, who thereby sustains 'an actual present loss' which appears to us to be a convertible term with 'actual value.'"[18] In Earl of Sheffield v. The London Joint Stock Bank,[19] which was an action to recover the value of securities, the following facts appear: Certain shares of railway stock with blank transfers, had been deposited by the plaintiff with one E. for the purpose of raising a certain sum of money. E. gave them to M. who was a money dealer to secure the payment of loan which had been advanced to E. by M. The latter deposited these shares in various banks as security for loan accounts, running between him and them, and the banks either knew, or had reason to know, that the securities did not belong to M. but to his customers. M. became bankrupt and the banks sold some of the securities belonging to the plaintiff and claimed to hold the proceeds as security for the debts due to them from M. The court, after deciding other points in favor of the plaintiff, held that S. was entitled upon payment to the banks of the money advanced by M. to recover the value of such securities as had been sold, at the time of the payment or tender of the amount due and demand, and to redeem the remainder.[20] In Simmons v. London Joint Stock Bank,[21] which was was an action claiming a return of certain securities or payment of their value, the measure of defendant's liability was declared to be the price of the securities realized

[18] Per Mellor, J.
[19] (1888) L. R. 13 App. Cas. 333.
[20] Reversing 34 Ch. Div. 95.
[21] L. R. (1891) 1 Ch. 270. See also Little v. London Joint Stock Bank, same page and case.

question does not appear to have been discussed. In this case, which was an action to recover the value of securities deposited with one for the purpose of raising money, who in turn handed them over to another and the latter gave them to defendants, who held them as security for money loaned to this last person, and the defendants sold part of the stocks, the plaintiff was held entitled to the value of the securities at the time he made demand for the securities and an offer or tender to the defendants of the amount due from him to the one who had deposited the securities with such defendants, the person who deposited them with defendants being the one who made the loan to the plaintiff and with whom the securities were pledged. In the cases of Simmons v. London Joint Stock Bank and Little v. London Joint Stock Bank,[28] in which it appeared that certain stocks of plaintiffs, of which defendant had possession, had part of them been sold by defendants who also refused to deliver the balance, the defendants were held liable for the price realized for such of the securities as had been sold with interest from the date of realization. In these two cases, from which we have quoted somewhat fully, it will be seen that the court confined the value to that at the time of conversion and refused to permit a recovery of the highest intermediate value, considering it too speculative and uncertain. None of the earlier decisions are, however, referred to in anyway in the opinions in these later cases, and the courts have in no case overruled them on this question. While, however, this is true, yet it would seem that there is a tendency, from these recent decisions, in favor of the rule which makes the measure of damages for conversion the value of the property at the time of the conversion, though that property may be stocks. In Canada, though we have noted one case, yet neither this nor any other decision appears to have considered the question, at least so far as we have been able to discover.

§ 1174. Summary of American decisions—General rules—Classification of states.—We have endeavored, in the preceding sections, to present a thorough review of all the cases in which the question of highest value has been considered. The

[28] L. R. (1891) 1 Ch. 270.

decisions may be divided into three general classifications, so far as they tend to support general rules. In Arkansas, Illinois, Iowa, Maine, Maryland, Massachusetts, Michigan, Nevada, New Hampshire and Pennsylvania we find the general rule declared to be in actions of trover, though the value may be fluctuating, the value at the time of conversion. In Texas also, in one decision, such is declared to be the measure of damages, dependent upon " the peculiar circumstances " of the particular case. The general rule, however, in this state seems to be the highest intermediate value up to time of trial, and this is also the recognized rule in Alabama, Florida, Georgia, Indiana, South Carolina, Wisconsin and Wyoming. In California and North Dakota such is the rule under Code provisions of these states. Yet another rule, which allows a recovery of the highest value up to a reasonable time after knowledge of the conversion within which to replace the property converted, has been declared to be the correct one in the United States supreme court, in Indiana, New Jersey, New York, Oregon and Tennessee. This rule appears to have first originated in the New York courts, is generally referred to as the New York rule, and has since been followed in the other jurisdictions mentioned, but in none of them has any decision declared it to be the rule where property other than stocks has been converted. In a late case, in Michigan, this rule is referred to by the court but is neither criticized nor followed, it appearing that either this rule, or the rule of value at time of conversion, would have given the same result.

§ 1175. Summary of American decisions—Classification as to property.—We have noticed, in the last section, the three general rules in this class of cases which appear to have arisen from the various decisions. It may be well also to note herein the decisions of the various states in reference to some of the classes of property, in which this question has arisen. In stocks the rule of value at time of conversion prevails in Illinois, Maine, Maryland, Nevada and Pennsylvania, while in the United States supreme court, in Indiana, New Jersey, New York, Oregon and Tennessee, the rule of highest value within reasonable time after knowledge of the conversion is regarded as the true one. In actions for the conversion of cotton in Alabama, South Carolina

and Texas, the highest value to time of trial may be recovered, while in Texas, in one case, value only at time of conversion was allowed, but the former rule is also probably the one ordinarily followed in this state. Where the property converted is lumber, the courts of Indiana, Massachusetts and Michigan favor the rule of value at time of conversion, while recovery of highest value to time of trial is allowed in Florida, Wisconsin and Wyoming. For the conversion of wheat, in Michigan, only value at time of conversion is recoverable. In Indiana, however, where wheat had been taken and sold, plaintiff was permitted to recover value at time of sale if contented therewith, but the court expressed the opinion that he was entitled to the highest value between time of taking and time of sale. The rule of value at time of conversion has also been followed in Massachusetts, in actions for the conversion of gin and of money, in Iowa of corn and of cattle, and in New Hampshire of money. In California and North Dakota, by Code, the plaintiff may, in actions for the conversion of personal property, recover the highest value between time of conversion and of trial, where the action has been prosecuted with reasonable diligence.

§ 1176. Summary of American decisions—Weight of authority.—While the decisions are in conflict upon this general question, it may be said that, in case of the conversion of stocks, the weight of authority supports the rule permitting a recovery of the highest value from the time of conversion up to a reasonable time after knowledge thereof, within which to replace the same. And, in actions for the conversion of property other than of stocks, at least so far as the number of jurisdictions may be said to constitute the weight of authority, it may be stated that the rule as to value at time of conversion has such support, though almost an equally large number favor the rule of highest value between time of conversion and time of trial. In any event the entire question seems to be in an unsettled condition.[29]

[29] Mr. Parsons says on this subject: "The value of the property being the measure of damages in trover, as this value may be different at different times and in different places, the question occurs which of these values is to be the measure. If goods are taken from the

§ 1177. Remarks—Generally.—It will be observed from an examination of the cases which we have referred to and noted in the sections immediately preceding, that there is no uniform rule as to what value is to be considered in estimating the dam-

owner and some months afterwards an action is brought, the owner may have lost the opportunity of selling them at the highest price they have reached in the interval. Is he limited to their value when converted; or if they have a higher value when he brings his action or tries it, may he have that value; or if they have been higher and are now lower, may he have the highest price that he could at any time have received for the property had it remained in his possession? Similar questions arise sometimes in actions for breach of contract to sell for a price payable in specific articles, in replevin, and in some other cases. The answer to these questions to be deduced from the general current of authority is that the value of the property at the time of the conversion with interest thereon, measures the damages. But it is certain that the courts are by no means in agreement on this point and some exceptions to the rule should certainly be admitted. Thus if it can be shown that the plaintiff suffered by the wrongdoing of the defendant a specific injury as by the failure of a specific purpose for which he had bought the goods, or perhaps by the loss of a specific opportunity of selling them at a certain profit, the principle of compensation would require that this should be taken into consideration." 3 Parsons on Contracts (ed. 1893), pp. 209–211. Mr. Sutherland reviews many of the cases upon this point, criticizes what he characterizes as the exception to the general rule, that is, the principles upon which are based the decisions which hold that the measure of damages is the highest intermediate value between time of conversion and time of trial (3 Sutherland on Damages [2d ed.], sec. 1119), and states in conclusion that "the general rule may safely and justly be departed from when it fails to furnish adequate compensation for the entire injury; as if there be a subsequent increase in price which the plaintiff would have or which the defendant has obtained. And if he has the property in his possession at the time of the trial, there is no injustice in compelling him to pay what it is worth at that time." 3 Sutherland on Dam. (2d ed.) sec. 1125. Mr. Sedgwick enters into an extended criticism of the New York rule (2 Sedg. on Dam. [8th ed.] secs. 520–523), which he says is in his belief as applied to contracts to carry stocks "erroneous and founded on a wrong principle; but it does little harm if confined to these cases. Any universal application of the principle on which it is supposed to be founded, to contracts and torts generally would be productive of serious confusion, and do much to imperil the existence of all the fixed rules of compensation which represent the body of the existing law of damages. For instance there is no difference between articles of fluctuating value and any other chattels. In fact all articles of commerce fluctate more or less in value. If, therefore, the New York rule is properly applied in stock transac-

ages for the conversion of property, the value of which is fluctuating. In some of the states, as we have pointed out, the value is that at the time of the conversion, whether the property converted be stocks or other personal property whose value is changeable. In other states the rule prevails that the measure of damages, in case of stocks, is the value of the stocks between the date or knowledge of the conversion and a reasonable time thereafter, within which to replace the stocks, while in case of other personal property, the value is fixed at the time of conversion. Again, in others, we find the measure of damages to be the highest value between the time of conversion and the time of trial. As to the reasons entering into and controlling these decisions, we have already fully presented them in extracts from the various cases in which this question has arisen. The question is certainly a difficult one to determine, either on the basis of existing decisions or from a logical and legal view, independent thereof. As to those cases where it is held that for the conversion of personal property of fluctuating value, the measure of damages is the value at the time of the conversion, there can certainly be little said in support thereof, especially where that property happens to be stocks which are generally of changeable value in the market. Such a rule would many times, perhaps, enable the wrongdoer to profit by his own wrong, while a person owning stocks might by no act of his own be deprived of the possession of property which might greatly in-

tions, it is as we have just said applicable in all cases of sales and the measure of damages for failure to deliver a chattel would not be as it is the difference between the market and the contract price at the time and place of delivery, but the difference within a reasonable time after breach for the plaintiff to replace himself. The doctrine of replacement is often spoken of in sales because the cost of replacing at the time and place of breach represents the actual value of the lost bargain; but wherever the question is res integra it may well be questioned whether on breach of a speculative stock contract (we take this as the extreme case, and the one for which the fluctuating rule was introduced) the law should regard it as the natural course of a prudent man to at once enter into a second contract of the same sort. But even if it does what he has actually lost is the value of the stock at the time of breach or notice and not the wholly uncertain profit which no retrospective examination of the markets will ever assure us he would have made." 2 Sedg. on Dam. (8th ed.) sec. 523.

crease in value within a short time after conversion or knowledge thereof. Why should the loss be visited upon the innocent person and the wrongdoer suffer no loss where, by his own act, he has been the direct cause thereof? That the latter was not actuated by malice or wrong motive should certainly not release him from the consequences of his own act, since, if he has acted in the wrong in a legal sense, he should be responsible for the damage caused by his act and should be required to make compensation for the loss sustained, which can hardly, it seems in every case, be limited to the value at the time of the conversion.

§ 1178. One argument for value at time of conversion—Criticism of.—In a case in Illinois,[80] we find an argument varying somewhat from those usually made for limiting recovery to value at time of conversion, in case of stocks. The remarks made by the court in this case, as a reason why such rule should be followed, furnishes, it seems to us, a strong argument also why such rule should not prevail. We quote as follows: "It is a fact, and one to which we cannot shut our eyes that within the last quarter of a century almost numberless private corporations have been brought into existence whose stocks, real or fictitious, have inundated the country and supplied both the means and the stimulus for the most active, reckless and corrupting speculations and practices of the age. These are encouraged by the fact that now and then, though the value of the franchise itself is the only capital, though it may be based upon lands, oil wells, mines, patent rights or railroad schemes, yet by the development of the country or some fortuitous circumstance persons occasionally realized great fortunes in these operations. Stocks that cost the owner little or nothing now and then advance to par and above. Suppose the owner of such stocks should pledge them when not worth ten cents on the dollar, and the pledgee convert them. They cost the owner little or nothing. Circumstances arise, however, which enhance their value. By delaying his suit or the trial of it until those circumstances have had their full effect, the plaintiff, by invoking the aid of the presumptions: (1) That he had parted with his money for the stock; (2) that he obtained the stock as a permanent invest-

[80] Sturgis v. Keith, 57 Ill. 451; 11 Am. Rep. 28.

ment; (3) that it is to be presumed that he would have kept it until the time of the trial, can elect to take the market value at the time of trial, when each of these presumptions is as baseless as the fabric of a dream. Such a rule instead of being general, fixed and certain, is merely speculative, conjectural and dependent upon accidental circumstances."[a] It may be well to state at this point, in connection with this decision and with the foregoing remarks, that such circumstances as outlined by the court would in many cases demand a rule other than value at time of conversion, in order to at all compensate for the loss sustained. Let it be supposed that the only capital may be the franchise based on coal fields, oil wells, or some other such property, as suggested by the court, and that the stocks cost the owner little or nothing. And while the stocks may possess no particular monetary value at the time of conversion, yet they may represent years of study, in the midst of oil fields or mining property, or the business ability and foresight resulting from the experiences of a lifetime, so that the owner of the stocks may be enabled to foresee the "development of the country" and has purchased them with that very object. In such a case, the "fortuitous circumstances" spoken of is the result of the owner's knowledge, experience, intelligence and foresight, and because the stocks represent little money value at time of conversion, why should he be deprived of that which his own ability would have brought to him financially. Let us suppose a case where owners of property had reason to believe, owing to knowledge acquired in oil fields, that oil existed upon their property. A company is formed and stock pledged to secure money for the purpose of drilling wells. At the time such stock is pledged it has little or no value. The pledgee, shortly after it has been pledged, converts the same to his own use. Shortly after the conversion, oil is discovered which renders the stock valuable. Should the owners be limited to value at time of conversion? Or should they recover an increased value? Which is more directly a compensation? How many times have we seen stock of little value increased many fold by the indefatigable industry and perseverance of the owners of such stock, who have acted and worked in an unfailing belief of the success of the proposition

[a] Per Mr. Justice McAllister.

which the stock represented? Is it a compensation in such cases to limit the value to time of conversion? Is it not rather opening the door to fraud on the part of persons holding stocks as pledgees or in some other character where they may convert them and reap the benefit of their own wrongdoing?

§ 1179. Remarks—Concluded—Extension of New York rule.—Some of the courts, which have adhered strictly to either the rule of value at time of conversion or highest value up to time of trial, appear to have abandoned such a rule, in case of stocks, in favor of the rule of highest value up to a reasonable time after knowledge of the conversion within which to replace the same. It may be that the principles underlying such a rule may cause other courts to also consider it as the only proper rule, in at least the case of stocks, and it may be that we may in time find the rule extended to include other property of fluctuating value. It may be said in opposition to such an extension, and possibly to the application in case of stocks, that all property is fluctuating in value and that it would be impossible to make a dividing line, and in some of the cases this very reason is given why the value should be confined to that at the time of the conversion. But, in this connection, it may be well to remark that stocks, and other species of personal property, are often bought to-day solely for investment or speculation, so as to reap the benefit of any fluctuations in value. Confining the value in all cases to that at the time of conversion would perhaps often defeat the very purpose of the owner. Much personal property is also bought, not for such purposes but the purposes of ordinary business and personal needs and necessities, when the purpose of the buying or the holding is not to reap the benefit of any fluctuations in values but for personal use or for the ordinary and everyday requirements of business life and commercial necessities. In such cases, the value at time of conversion would probably as nearly compensate for the conversion as it would be possible to. But where the property is bought solely for the purpose of benefiting by any fluctuations in value it is inequitable, it would seem, to confine the damages to the value at the time of conversion. For instance, wheat and corn are

articles which at the present time are decidedly fluctuating in their values. These articles are often bought for investment or speculation and the same reasons underlie an extension of the rule to this species of property as do its application in the case of stocks. Yet, in none of the decisions, has the rule, fixing the measure of damages as the value at any time between the time of conversion and a reasonable time after knowledge thereof, been applied to any other species of personal property than that of stocks. Where the property has been other than stocks, the rule has either been value at time of conversion or between time of conversion and time of trial, in some states the latter rule being qualified by the statement, provided the suit is commenced within a reasonable time. It would seem almost impossible to state a rule which would apply in every instance. To declare that in all cases, no matter what the property might be, the measure of damages should be the value of the property at the time of conversion, seems to us, would hardly be a rule in conformity with the law of damages which is based on compensation to the person injured by the one by whose wrongful or negligent conduct the injury was caused. On the other hand, to say that the measure of damages might be the highest value between the time of conversion and time of trial, would also possibly cause the damages to be more in the nature of a punishment, where the facts of the case would not perhaps warrant an award of punitive damages, as where the defendant had acted in the honest belief that he was in the exercise of his lawful rights. A strict application of the former rule, and adherence thereto, under any state of facts, would frequently impose a hardship upon the owner of the converted property by not giving to him that which the law says he shall have, namely compensation for the injury done. On the other hand, a similar adherence to the latter rule would frequently cause an award of damages in excess of what would be a compensation and more in the nature of a punishment, when not warranted by the facts of the case. Again, to confine any rule, in its application, to any one species of personal property, such as stocks, and say that all other species of personal property shall be subject to the rule of value at time of conversion seems hardly feasible or reasonable, Many articles of trade and com-

merce to-day, such as cotton, wheat and corn are perhaps, owing to the operations therein in the various exchanges and business centers of the country, subject to great fluctuations in value and are largely bought for investment or speculation the same as stocks. As between the two rules, value at time of conversion or value up to time of trial, in cases other than of stocks, the former rule, it must be acknowledged, is supported by the weight of authority, while in the case of stocks the value up to a reasonable time after knowledge of the conversion within which to replace them is the rule followed in the majority of jurisdictions. The latter rule, certainly in the case of stocks, is the most equitable, having the support of both reason and justice, and, in the absence of special circumstances, being the only rule consistent with the fundamental law of damages. In none of the decisions has this rule been applied in cases for the conversion of other property than stocks. Yet it would seem that, no matter what the character of the property converted may be, if it appear to be property of a fluctuating value and especially in such case where bought for investment or speculation, damages measured in accordance with such rule would most nearly approach the idea of compensation and therefore be more strictly in accordance with the law of damages. In none of the jurisdictions, in which this question has arisen, does there appear to have been any recent decisions in cases other than stocks. In New York, where this rule prevails, the rule formerly prevailed of highest value to time of trial, as was also the case in Indiana, except in one case, which was an action for the conversion of lumber, where it was held that the value at the time of trial was the measure of damages. In the other jurisdictions we find no case where the article converted was other than stocks so that, so far as the decisions are concerned, the rule, which may perhaps be styled the New York rule, is limited to those cases, where the property converted happens to be stocks. Our remarks, as to the extension of this rule to other species of property, are therefore made without any supporting decisions to sustain such extension of the rule, but are simply in a suggestive manner, in the belief that neither the rule as to value at time of conversion nor as to highest intermediate value to time of trial are equitable and

just ones, in all cases of conversion of personal property of fluctuating value, but that the rule as to highest value, within a reasonable time after knowledge of the conversion within which to replace the property, is oftentimes the most equitable, the most consonant with the general principles underlying the law of damages, being far more likely to give the owner of the property the compensation for the injury sustained, without on the other hand imposing upon a wrongdoer a punishment which the facts of the case do not justify.

CHAPTER XLVIII.

SEVERANCE FROM REALTY.

§ 1180. Severance of minerals—California.
1181. Severance of minerals—Colorado.
1182. Severance of minerals—Illinois.
1183. Severance of minerals—Iowa.
1184. Severance of minerals—Maryland.
1185. Severance of minerals—Massachusetts.
1186. Severance of minerals—Nevada.
1187. Severance of minerals—New York.
1188. Severance of minerals—Pennsylvania.
1189. Severance of minerals—Federal decisions.
1190. Severance of minerals—English cases.
1191. Severance of minerals—English cases—Continued.
1192. Cutting and conversion of trees—Federal decisions.
1193. Cutting and conversion of trees—Alabama.
1194. Cutting and conversion of trees—Arkansas—Florida—Georgia.
1195. Cutting and conversion of trees—Maine.
1196. Cutting and conversion of trees—Michigan.
1197. Cutting and conversion of trees—Minnesota.
1198. Cutting and conversion of trees—Mississippi.
1199. Cutting and conversion of trees—New Hampshire.
1200. Cutting and conversion of trees—New York.
1201. Cutting and conversion of trees—North Carolina.
1202. Conversion of wheat in field—Iowa.
1203. Conversion of corn in field—Indiana.
1204. Severance of minerals—English rule.
1205. Severance of minerals—American rule.
1206. Cutting and conversion of trees—Mistake.
1207. Cutting and conversion of trees by mistake—General rule.
1208. Rules in case of trees differ from rule where minerals converted.
1209. Good faith—What amounts to.
1210. Severance from freehold—General rule where wilful.
1211. When conversion takes place.

§ 1180. Severance of minerals—California.—In a case in California,[1] which was an action to recover possession of certain

[1] Goller v. Fett, 30 Cal. 482.

mining property, to which both parties claimed title, and also damages for certain gold ore which had been mined by defendants, it was held that the court below erred in refusing to permit defendants to prove the expense of digging the gold bearing earth and separating the earth from the gold, since such evidence was admissible on the question of damages.[2]

§ 1181. Severance of minerals—Colorado.—In Colorado,[3] the court declares that the true rule in trover should be "the value of the chattel as such, when and where first severed from the realty and becoming a chattel."[4] This was an action for the conversion of ore from plaintiff's mine, which was sold to defendant who was held liable, though ignorant of the conversion, and the measure of damages was declared to be, in this particular case, the "value of the ore sold, as shown, less the reasonable and proper cost of raising it from the mine after it was broken and hauling from the mine to defendants' place of business." The court in this case also discusses the different remedies where property has been severed from the realty, and distinguishes the rules applicable in each.

§ 1182. Severance of minerals—Illinois.—In Illinois this

[2] The court cited Maye v. Yappan, 23 Cal. 306, as having directly decided this point. The case cited was an action to recover for injury to mining property and not for conversion, where it appeared that the defendant had not acted wilfully or intentionally and in which the court said in its opinion: "It will be noticed that the rule of damages in such cases depends to some extent upon the form of the action, whether the action be for injury to the land itself or for the conversion of a chattel which had been severed from the land. . . . No demand of the possession of the gold after it was separated from the earth appears to have been made upon the defendants, and the gravamen of the action appears to be the injury done to the land itself by the acts of the defendants. The proper rule of damages in a case like the present is the value of the gold bearing earth at the time it was separated from the surrounding soil and became a chattel. This seems to be a just and proper rule and one established by the decisions upon this question. In estimating these damages, the expense of extracting the gold and separating it from the earth after it is first moved from its original location is to be deducted from the value of the gold taken out of the mining ground of the plaintiffs." Per Crocker, J.

[3] Omaha & Grant Smelting & Refining Co. v. Tabor, 13 Colo. 41; 5 L. R. A. 236; 21 Pac. 925; 16 Am. St. Rep. 185.

[4] Per Reed, C.

question arose, in an action of trover for coal taken from the land of another and converted,[5] and the measure of damages was declared to be the value at the mouth of the pit less the cost of transportation there from the place where dug, but allowing nothing for labor bestowed in digging the coal or separating it from the earth and other layers or substances. The court said: "When detached from the clay, stone, slate and sulphur, and after all the labor has been bestowed upon it that is required to make it the coal of commerce, then and not till then is it to be considered as fully severed from the mass and under the control of the miner, and then and not till then is the conversion complete. Then the value attaches which becomes the basis of the measure of damages and to ascertain that value we deduct from the value at the mouth of the pit, the cost of transportation from the place where dug to the mouth of the pit. This affords a simple and certain rule for the ascertainment of damages and is consistent with former decisions of the court and avoids giving compensation to the trespasser and tort feasor for his labor, unlawfully expended in producing the coal. The same rule is held in the English cases which have been heretofore cited and approved by us.[6] In these cases, as in former decisions of this court, expressions such as the 'the value of the coal as soon as it exists as a chattel,' and the like, are used; but such expressions are uniformly found in immediate connection with some such statement as that in the leading case of Martin v. Porter, where it is said, 'which value would be the sale price at the pit's mouth after deducting the expense of carrying the coals from the place in the mine where they were got to the pit's mouth.' This showing that the time fixed for the valuation of the coal is, after all the labor on it has been performed and it is severed from the other layers and substances and first exists as the chattel to which the labor bestowed was intended to reduce it. None of these cases indicate an intention to allow compensation for the labor expended in procuring the coal."[7] This decision is in line with the case of McLean County Coal Company v. Long,[8]

[5] McLean County Coal Co. v. Lennon, 91 Ill. 561; 33 Am. Rep. 64.

[6] Citing Martin v. Porter, 5 Mees. & Wels. 302; Morgan v. Powell, 43 Eng. Com. L. 739; Wild et al. v. Holt, 9 Mees. & Wels. 672.

[7] Per Barker, J.

[8] 81 Ill. 359.

which was also an action of trover for the mining and conversion of coal, and in which the same rule for determining the damages recoverable was declared to be the proper one. And it was also said in this case that the rule was the same, whether the action be trespass or trover.[9]

§ 1183. Severance of minerals—Iowa.—In a case in this state, where both plaintiff and defendant claimed the right to work a certain mining property, the former by execution sale under a judgment against a third party and the latter by virtue of a lease from such third party, and the right to work the mine being adjudged in favor of the lessor, his measure of damages was held to be the value of the mineral taken out by the plaintiff, together with interest thereon from the time it was mined and sold, less the reasonable cost of mining, and the amount of rent due under the lease, it not appearing that the plaintiff was guilty of wilful wrong or gross neglect.[10]

§ 1184. Severance of minerals—Maryland.—In Maryland the question, as to the measure of damages in actions to recover for mining and carrying coal from the land of another, has arisen in actions of trespass, and in these cases the rule in this state is that, independent of any circumstances of aggravation, the measure of damages is the value of the coal immediately upon its conversion into a chattel by severance from the freehold, and that there should be no allowance made for the

[9] See in this connection Illinois & St. Louis R. R. & Coal Co. v. Ogle, 82 Ill. 627. In this case the court had instructed the jury in part as follows: "If the jury believe, from the evidence, that the defendant by its servants and employees mined coal from plaintiff's land without his consent as alleged in the declaration and did so by mistake or inadvertence, and without knowledge that the coal was being mined from plaintiff's land, then the jury are bound to allow plaintiff the value of the coal taken from his land . . . estimated at the pit mouth, less the cost of carrying it from where it was dug to the pit mouth, or in other words, the plaintiff under the above circumstances is to be allowed the value of the coal at the pit mouth less the cost of carrying it there from the place where it was dug, allowing defendant nothing for the digging," and this instruction was held correct. See also Robertson v. Jones, 71 Ill. 405, which was an action of trespass for the taking of coal from a mine, and where a like decision was rendered.

[10] Chamberlain v. Collinson, 45 Iowa, 429.

cost of severance.[11] In the case last reported in this state,[12] the court said: "As the fact to be aimed at is the worth of the coal just after its severance and before the removal is begun, it does not vary the rule of compensation whether its value at that time is ascertained by what it would sell for when brought to the surface, and then deducting the mere cost of bringing it there or by estimating its worth before it was removed, where, as in the present case, it has been actually taken from the pit and sold. . . . It does not seem material in a case like this whether the value of the coal at the mine's mouth be first ascertained and then an allowance be made for the bare expense incurred in its simple conveyance thither, or witnesses be asked to estimate directly its value just prior to removal. The rule of compensation is practically observed in either case. The former method is not deemed inconsistent with the rule in the Illinois cases, as the court in the first named,[13] whilst stating 'plaintiff could recover as damages the value of the coal at the mouth of the shaft, less the cost of conveying from the place where it was dug,' expressly adds, 'This is in effect saying he can recover the value of the coal when it first became a chattel by being severed from the mass and under their (defendants') control.'"[14] And in an earlier case in this state, where a similar action had been brought, it was held that there should be no deduction for expense of severing the coal, and the court on appeal affirmed a ruling of the court below, refusing to instruct the jury that if defendant without knowing it was trespassing upon the property of the plaintiff and believing that it was its own coal, dug out and carried away the coal of the plaintiffs, then the damages for such digging and carrying away of the coal is the value of the coal in the mine.[15]

§ 1185. Severance of minerals—Massachusetts.—In Massa-

[11] Blaen Avon Coal Co. v. McCulloh, 59 Md. 403; 43 Am. Rep. 560; Franklin Coal Co. v. McMillan, 49 Md. 549; 33 Am. Rep. 280 n. Barton Coal Co. v. Cox, 39 Md. 1; 17 Am. Rep. 525.

[12] Blaen Avon Coal Co. v. McCulloh, 59 Md. 403; 43 Am. Rep. 560.

[13] McLean Coal Co. v. Long, 81 Ill. 359.

[14] Per Ritchie, J.

[15] Barton Coal Co. v. Cox, 39 Md. 1; 17 Am. Rep. 525, followed in Franklin Coal Co. v. McMillan, 49 Md. 549; 33 Am. Rep. 280 n.

chusetts,[16] the damages recoverable against one who has wrongfully taken ore from the mine of another should, it is declared, be estimated on the value of the ore as it lay in the bed, and not as it was after the defendants had increased its value by raising it to the surface. To this should also be added compensation for any damage done to the real estate.

§ 1186. Severance of minerals—Nevada.—In Nevada, it is declared by the court in an action to recover damages for extracting ore from the mine of another,[17] that in all actions sounding in tort where there does not appear to have been any fraud or culpable negligence, compensation only should be given to the injured party for his losses, and therefore, such elements not appearing in the present action, the court erred in instructing the jury not to include in defendant's expenses, to be deducted from the gross yield, defendant's necessary expense of mining the ores.

§ 1187. Severance of minerals—New York.—In a more recent case in New York this question arose in an action to recover for the conversion of coal.[18] It was claimed that defendant, who was a lessee of certain coal mines under plaintiff, had not accounted for a certain class of coal of a small size. Under the lease the defendant was only entitled to coal of a larger size, it being provided that all which fell through a screen having a half inch mesh remained the property of the lessor. By inventions made subsequent to the lease, this smaller coal, known as culm, was converted by lessee into coal known as pea coal, which became a valuable article of merchandise and was converted by defendant and sold. It was held that the ordinary measure of damages, applicable in cases of trover and conversion or in actions of assumpsit, applied in this case, and that the lessor was entitled to the value of the coal at the time and place of conversion, there being no allowance made for the cost of mining the same, and it was held proper not to permit the

[16] Stockbridge Iron Co. v. Cone Iron Works, 102 Mass. 80. Action in tort praying for relief in equity for injury to plaintiff's land.

[17] Waters v. Stevenson, 13 Nev. 157; 29 Am. Rep. 293.

[18] Genet v. Delaware & H. Canal Co., 14 App. Div. 177; 43 N. Y. Supp. 589.

lessee to show by a witness the fair market royalty paid for pea and buckwheat coal in connection with leases or contracts, by which the right to take other and larger sizes of coal was granted.

§ 1188. Severance of minerals—Pennsylvania.—In an earlier case in Pennsylvania which was an action of trover for coal mined and carried away from plaintiff's land by mistake,[19] it was held that the measure of damages was not the value of the coal after the defendant had been at the expense of mining, but only its value in place and with such other damage to the land as the mining may have caused. In this case it had been decided, in the court below, that the plaintiff was entitled to recover the value of the coal as it lay in the pit after it had been mined. The court on appeal declared that they admitted "the accuracy of this conclusion if we may properly base our reasoning on the form rather than on the principle or purpose of the remedy." But in a later case it is held that the general principle is that the damages are to be assessed at the time of conversion and in this case, which was an action of trover for coal severed from the freehold and sold by defendant, the time of conversion was held to be the time of sale.[20] In this case the court referred to the above decision and distinguished it from the one before them. The court said: "The only remaining question is what is the true measure of damages? In regard to this there would be no doubt were it not for Forsyth v. Wells.[21] The general principle undoubtedly is that the damages are to be assessed at the time of the conversion. In Forsyth v. Wells it appeared that the defendant who had a coal drift and mine upon his own land had by mistake worked over upon the land of the plaintiff and had taken out therefrom coal which he had converted to his own use. Two questions were raised, one of which was whether trover would lie? And the other was, what was the measure of damages? It was held by this court that the true measure of damages was the fair value of the coal

[19] Forsyth v. Wells, 41 Pa. St. 291; 80 Am. Dec. 617. Parties were adjoining owners and boundary line was not exactly known.

[20] Lyon v. Gormley, 53 Pa. St. 261.

[21] 5 Wright (41 Pa. St.), 291.

in place with such other damage to the land as the mining may have caused. The decision was made by a bare majority of the court and it is to be regarded as ruling nothing more than the law as applicable to the circumstances of that case. Then the coal had been taken under a mistake of right and the act complained of was substantially a trespass. It was a case for compensation and though it was held trover would lie, the action was treated as an action of trespass quare clausum fregit for an injury not wanton. Thus the damage to the land caused by mining was reckoned as a constituent in addition to the value of the coal in place. In fact it was impossible to distinguish the conversion of the coal from the trespass upon the land, but in the case now before us the facts are widely different. The excavation of the coal and its removal from the land of the plaintiff were not acts of trespass. They were authorized by law. There is therefore no connection between the wrong done by the defendant and the severance of the coal from the freehold. Even in actions of trespass it has been held that the plaintiff is entitled to recover the value of the coals taken from his land at the time when they first existed as chattels and that the defendant is not entitled to a deduction for the expense of getting them.[22] These are cases where the excavation and the carrying away were one continuous act. Much more is the plaintiff in this case entitled to recover the value of the coal as a chattel estimated as of the time of conversion."[23] In this case it appeared that the defendant had constructed under an act of Pennsylvania an underground railroad on the land of the plaintiff and, in its construction, had severed from the freehold, converted and sold several thousand bushels of coal.

§ 1189. Severance of minerals—Federal decisions.—The rule has been affirmed by the United States supreme court that in estimating the damages for the wrongful conversion of ore, no allowance should be made for the cost of mining the same.[24] But in a case which came before the United States circuit

[22] Citing Martin v. Porter, 5 M. & W. 351; Wild v. Holt, 9 M. & W. 672; Morgan v. Powell, 3 Ad. & E. N. S. 278.

[23] Per Strong, J.

[24] Benson Min. & S. Co. v. Alta Min. & S. Co., 145 U. S. 428; 36 L. Ed. 762; 3 U. S. App. 125. See also Golden Reward Min. Co. v. Buxton Min. Co., 97 Fed. 422.

court,[25] the action had been brought to recover the value of stone which had been taken by defendant, who was ignorant of the boundary line, from the plaintiff's land. The parties were owners of adjacent land. In this case the jury had been advised to find only the value of the stone after it was detached from the land and had become personalty, and this was declared to be "within the rule as laid down in all courts."[26]

§ 1190. Severance of minerals—English cases.—One of the earliest cases in England, in which this question arose, was that of Martin v. Porter,[27] where the plaintiff brought an action to recover damages for coal taken from his premises by defendant and it was held, in that case, that the measure of the damages was the value of the coal when it became a chattel, which would be the sale price of the coal at the pit's mouth, less the cost of carrying the coal to such place from the place in the mine where dug. This was subsequently cited, approved and followed in Morgan v. Powell,[28] which was an action of trespass for digging coal in plaintiff's mine and taking and converting the same. Shortly prior to the last decision, however, in an action of trover, which had been brought for the conversion of coal, where the plaintiff claimed damages on the principle laid down in Martin v. Porter,[29] which damages would have amounted to about ten thousand pounds, it was contended by Sir W. W. Follett for the defendant that, as there was no imputation of fraud or want of reasonable care and caution on the part of the defendant, damages might be assessed on the principle that the defendant should pay the fair price per acre at which the bed of coal would have been sold to a person who was to be at the expense of getting it. Mr. Baron Parke told the jury that if they found for the plaintiffs, they were to determine what damages should be given; that if there was fraud or negligence on the part of the defendant they might give as damages under the count in trover the value of the coals at the time they first became chattels, on the principle laid down in Martin v. Porter,[30]

[25] Cheeney v. Nebraska, etc., Stone Co., 41 Fed. 740 (C. C. Dist. Colo.).
[26] Per Hallett, J.
[27] 5 M. & W. 351.
[28] 3 Ad. & El. N. S. 278. See also Wild v. Holt, 9 M. & W. 672.
[29] 5 M. & W. 351.
[30] 5 M. & W. 351.

but if they thought that the defendant was not guilty of fraud or negligence but acted fairly and honestly in the full belief that he had a right to do what he did, they might give the fair value of the coals as if the coal field had been purchased from the plaintiff. The latter estimate was adopted by the jury who assessed damages at so much per acre, amounting to about twenty-three hundred pounds, instead of about ten thousand pounds as claimed.[31] This case was subsequently noted in substance as above in Hilton v. Woods,[32] where it was declared that the decision was acquiesced in and was the principle which the court intended to apply in the present case. In the case of Llynvi Company v. Brogden,[33] Sir James Bacon, V. C., refers to Hilton v. Woods,[34] and Wood v. Morewood,[35] and says: "I do not find that having regard to the facts in the two cases I have lastly referred to, and in both of which the question was one of right, the principle upon which just allowances were directed is at all in variance with the previous decisions." In this case a bill had been brought by the plaintiff against the defendants, who were owners of a mine adjoining a mine of the plaintiffs, complaining that defendants had in working their mine encroached upon plaintiff's land and raised coal belonging to the latter, without license or authority from plaintiffs. The bill prayed for an account of all coal worked by defendants from under plaintiffs' mine and that they be decreed to pay the value thereof and whatever damages was caused to plaintiffs by defendants having broken through the boundary line. The court found for plaintiff and that defendant was liable to account for the value of the coals at the pit's mouth, with just allowance for cost and expenses of bringing such coal to the pit's mouth, but not including the cost of getting or severing the coal.

§ 1191. Severance of minerals—English cases—Continued.—Again, in Jegon v. Vivian,[36] which was an action of trespass, the general principles laid down in Martin v. Porter,[37] and modified by Baron Parke in Wood v. Morewood,[38] it was said by

[31] Wood v. Morewood, 3 Ad. & El. N. S. 440 n. See also Jegon v. Vivian, L. R. 6 Ch. 742.
[32] L. R. 4 Eq. 441.
[33] L. R. 11 Eq. 188.
[34] L. R. 4 Eq. 432.
[35] 3 Ad. & El. N. S. 440 n.
[36] L. R. 6 Ch. 742.
[37] 5 M. & W. 351.
[38] 3 Ad. & El. N. S. 440 n.

Lord Hatherly, L. C.: "I think that the milder rule of law is certainly that which ought to guide this court, subject to any case made of a special character which would induce the court to swerve from it; otherwise on the one hand a trespass might be committed with impunity if the rule in poesnam were not insisted; so on the other hand, persons might stand by and see their coal worked, being spared the expense of winning and getting it." The decree of the master of rolls in this case was varied so as to charge the defendants with the fair value of the coal and other minerals at the same rate as if the mines had been purchased by the defendants at the fair market value of the district. Shortly after this decision the question again arose, in another action of trespass for coal wrongfully taken by working into the mine of an adjoining owner,[39] and it was declared in this case that the measure of damages was the market value of the coal at the pit's mouth, less the actual disbursements in severing the coal and bringing it to the pit's mouth. As to the meaning or interpretation of the phrase "actual disbursements," we quote the words of Sir James Bacon, V. C., in this case: "The words which are supposed to have been used are 'actual cost and expenses;' the word that has been read from the shorthand notes is 'disbursements.' In my opinion there is not the slightest doubt about the meaning of either of these expressions. It is said that the trespasser must be treated as if he had been a purchaser. Now that must be taken with a certain qualification. . . . The principle of the decision is that the plaintiff, although he has suffered a wrong, shall not have any more than he would have had if the wrong had not been committed. That I take to be the clear and plain principle. If he had himself severed the coal he could only have done so by means of disbursements. If he had brought it to the pit's mouth when severed he could only have done so by means of disbursements. . . . The trespasser is not to charge as if somebody else had employed him to sever. If he had paid a certain sum to his workmen, and by the custom of the trade was entitled to charge a certain other sum, he is not to have the larger sum. The plaintiff is to be put in the same position as he would have been in, neither better nor worse, if he himself

[39] In re United Merthyr Co., L. R. 15 Eq. 46.

had severed the coal and brought it to the pit's mouth. That must have been done, and could only have been done by means of disbursements, not by any profit, not by any allowance in the trade, not by any artificial mode of guessing at it; but the books he must have kept would show how much money he spent in severing the coal and how much money he spent in bringing it to the pit's mouth." And in a still later case, where it appeared that coal had been mined from the premises of another, the taking being done in perfect ignorance, with no bad faith or sinister intention, the measure of damages was held to be the value of the coal to the person from whom it was taken and at the time it was taken. Under the peculiar circumstances of the case, it was held that the best evidence of such value was the royalty paid to the owners of surrounding coal fields, together with damages for any injury done to the house on the surface.[40] In this case it was said by Lord Hatherly: "There is no doubt that if a man furtively and in bad faith robs his neighbor of property, and because it is under ground is probably not for some time detected, the court of equity in this country will struggle, or I would rather say will assert, its authority to punish fraud by fixing the person with the value of the whole of the property which he has so furtively taken, and making him no allowance in respect of what he has so done as would have been justly made to him if the parties had been working by agreement, or if, as in the present case, they had been, the one working and the other permitting the working through a mistake. The courts have already made a wide distinction between that which is done by the common error of both parties and that which is done by fraud." Lord Blackburn referred to the case of Jegon v. Vivian,[41] where it was held that the measure of damages was the fair market value of such coal at the same rate as if the mines had been purchased by the defendants at the fair market value of the district, and said: "That I understand to mean as if the mines had been purchased while the minerals were yet part of the soil. That I apprehend is what is to be done here."

[40] Livingstone v. Rawyards Coal Co., L. R. 5 App. Cas. 25.

[41] L. R. 6 Ch. 742, noted in this section.

§ 1192. Cutting and conversion of trees—Federal decisions.—In Bolles Wooden Ware Company v. United States,[42] this question is carefully considered. In this case, which was an action in the nature of trover for the conversion of trees, it was held that, where the trespass was wilful, the full value of the property at the time and place of demand or of suit brought with no deduction for the labor and expense of the defendant, was the measure of damages, but that if unintentional, then the value at the time of conversion less what the labor and expense of defendant had added to the value was the proper rule to be applied. In this case the timber had been sold to the defendant by a wilful trespasser, and the plaintiff was permitted to recover the value at the time of sale to defendant, though the latter was without notice of the wrong. The court, per Mr. Justice Miller, said: "The doctrine of the English courts on this subject is probably as well stated by Lord Hatherly in the House of Lords in the case of Livingston v. Rawyards Coal Company,[43] as anywhere else. He said: 'There is no doubt that if a man furtively in bad faith robs his neighbor of his property and because it is underground is probably for some little time not detected, the court of equity in this country will struggle or I would rather say will assert its authority to punish the fraud by fixing the person with the value of the whole of the property which he has so furtively taken, and making him no allowance in respect of what he has so done as would have been justly made to him if the parties had been working by agreement.' But 'when once we arrive at the fact that an inadvertence has been the cause of the misfortune, then the simple course is to make every just allowance for outlay on the part of the person who has so acquired the property and to give back to the owner so far as is possible under the circumstances of the case the full value of that which cannot be restored to him in specie.' There seems to us no doubt that in the case of a wilful trespass the rule as stated above is the law of damages both in England and in this country, though in some of the courts the milder rule has been applied even to this class of cases. Such are some that are cited from Wisconsin.[44] On the other hand the weight of au-

[42] (1882) 106 U. S. 432; 27 L. Ed. 230, action for cutting and carrying away timber.

[43] L. R. 5 App. Cas. 33.

[44] Single v. Schneider, 24 Wis. 299; Weymouth v. R. R. Co., 17 Wis. 550.

thority in this country as well as in England favors the doctrine that where the trespass is the result of inadvertence or mistake and the wrong was not intentional, the value of the property when first taken must govern, or if the conversion sued for was after value had been added to it by the work of the defendant, he should be credited with this addition." Again, in the case of Bly v. United States,[45] which was an action brought to recover for timber cut from the public lands of the United States, it was declared by Judge Dillon that "where timber has been cut into logs upon the public lands by a person who knows that the land belongs to the government or who has no reasonable grounds to believe that it belongs to him or to some one under whom he claims, and such logs are by him hauled to the water course and rafted and taken to a distant boom by means of which labor of the wrongdoer, their value is much enhanced beyond their value when first severed from the freehold, the government may replevy such logs in the boom or may maintain an action in the nature of trover for their value and in either case may recover without deduction for the enhanced value which may have been given to the logs after the severance from the freehold by the labor of the wrongdoer." The learned judge then refers to cases where timber or ore is inadvertently cut or mined owing to mistakes in boundary lines and says in this connection: "If a private proprietor of timber lands used due precautions to ascertain his boundaries and by mistake of the surveyor or without negligence or fault on his part or that of his servants unintentionally cuts on the adjoining lands of the government, he in good faith supposing he was cutting on his own lands and the government neglected or delayed to bring trover until the logs thus cut were enhanced in value two or three hundred fold by the labor of bringing them to market, in such a case it may be that the court would be warranted in directing the jury to allow as damages the value of the logs when first severed and interest on that value. I am inclined to think the true doctrine of the measure of damages in trover is sufficiently flexible to allow this to be done when justice requires no greater recovery; but the cases now before the court do not

[45] (1877) 4 Dillon (C. C.) 465.

require a judgment on the point, and I leave it open for further consideration should it arise."

§ 1193. Cutting and conversion of trees—Alabama.—In Alabama,[46] it is declared that in an action against an unintentional trespasser or his innocent vendee for the conversion of timber cut from land of the plaintiff, the true rule for determining the damages is the value of the timber immediately after severance with interest thereon, and that the plaintiff cannot recover the enhanced value of the timber resulting from the labor of the trespasser in preparing and transporting the timber to market. It was also declared in this case that a mistake as to boundaries and an honest belief as to ownership would constitute no defense to the action, although it might affect the amount of recovery.[47] In this case the court held that forms of action had not been abolished in that state, and said: "Trover is brought for the conversion of personal property, and it would seem incongruous to say that the damages could be assessed upon the principle adopted in actions of trespass quare clausum fregit when the gravamen of the complaint is essentially different. Cases can be easily perceived in which the value of the timber after severance would very inadequately compensate the owner for the trespass. . . . Under such circumstance he may accommodate his selection of a form of action to the necessities of the case and bring trespass for entering his land and severing and removing timber or trees, in which case he would recover as actual damages the diminished value of the land, or, to state it more definitely, the value of the trees standing, and any injury to the freehold by reason of their removal. . . . When trover is brought the trespass upon the land is, so to speak, waived or disregarded; and when brought for the conversion of logs or trees as chattels under the circumstances of this case, the true rule in our opinion is the second above stated, according to which the value immediately after severance, with interest, furnishes the proper measure of recovery."

§ 1194. Cutting and conversion of trees — Arkansas—

[46] White v. Yawkey, 108 Ala. 270; 32 L. R. A. 108; 54 Am. St. Rep. 159; 19 So. 360.

[47] As to point first mentioned in text, see also Brooks v. Rogers, 101 Ala. 111; 13 So. 386.

Florida—Georgia.—In Arkansas, one who wilfully enters the land of another and cuts and removes timber therefrom and sells the same, is liable to the owner for the full value of the timber at the time of the sale, with no allowance for labor and expenses, but if the cutting and removal of the timber was done by mistake, then there may be an allowance therefor in estimating the damages.[48] In Florida, the value of the timber at the time and place of conversion is the measure of damages where the act of the defendant was wilful, the time of conversion being declared to be when the timber was removed from plaintiff's land.[49] This the court declares to be the general rule, except where modified in favor of innocent purchaser after conversion or innocent mistake. In Georgia, the measure of damages, for cutting and carrying away trees, is the value of the trees at the time they were felled and at the place where they were felled.[50]

§ 1195. Cutting and conversion of trees—Maine.—In a recent case in Maine,[51] which was an action for the conversion of timber, the court declared that the general rule for determining the measure of damages, in an action of trover, was the value of the property at the time of conversion with interest from the time when the cause of action accrues. The court reviews several cases in which the question is similar to the one before the court in this case and says: "The distinction in these cases to which we have referred and the case at bar should be borne in mind—the time when the conversion by the defendant took place—and when that is done and the rule applied, much of the seeming difficulty in the application of the rule vanishes. The trouble is not in the rule but in applying it to the facts of each particular case. Facts which may be held to constitute conversion in one case may so vary in another as

[48] Central Coal & C. Co. v. John Henry Shoe Co., 69 Ark.—; 63 S. W. 49. See also Eaton v. Langley, 65 Ark. 448; 47 S. W. 123; 42 L. R. A. 474, where the above rule was qualified by the provision that the expenditures did not exceed the increase in value, in which case there might be a recovery of the value of the property in its new form, less the increase.

[49] Skinner v. Pinney, 19 Fla. 42; 45 Am. St. Rep. 1.

[50] Smith v. Gouder, 22 Ga. 353, action of trespass quare clausum fregit.

[51] Wing v. Milliken, 91 Me. 387; 40 Atl. 138; 64 Am. St. Rep. 238.

to lead the court to conclude that conversion took place at an entirely different time and with a material difference, therefore, in the amount of damages to be awarded. In the case at bar the conversion by the defendant was not when the timber was cut or severed from the realty, it was not until after the same had been hauled from the land and sawed into spool timber and this action is brought for converting that lumber after it was sawed and stacked. Staples, who cut the birch from the land, was a tenant in common with the plaintiff, not only of the land from which it was cut, but also tenant in common of the birch after it was landed at the mill. There was no interference by the defendant nor acts constituting conversion by him till it was sawed. The plaintiff might have brought replevin for the same and thereby have acquired the benefit of whatever labor had been bestowed upon it. . . . To say that the owner may retake the property in an action of replevin in an improved state, as all the authorities hold, and yet that he may not, when he sees fit to resort to an action of trover, recover the equivalent in damages, is a a subtlety too refined to be adopted in the ordinary affairs of business transactions and, as was said by Strout, J., in Powers v. Tilley,[52] would relieve trespassers from all loss and would tend to encourage wrongdoing."[53] And in a case which arose in this state shortly prior to the above decision, where a trespasser had cut trees from plaintiff's land and manufactured them into sleepers and then sold them to defendant, it was held that the measure of damages was the value of the sleepers at the time of their conversion by the purchaser, no deduction being made for the labor expended by the trespasser prior to such time. The court in this case referred to decisions which allowed a mitigated rule of damages against involuntary trespassers, but declared that if defendant claimed the trespass was not wilful, it was for him to show, before he could ask any mitigation of the ordinary rule of damages, and that no such evidence appeared in the present case.[54] In an earlier case in this state,[55] which was also an action for the

[52] 87 Me. 34.
[53] Per Foster, J.
[54] Powers v. Tilley, 87 Me. 34; 47 Am. St. Rep. 304; 32 Atl. 714.
[55] Moody v. Whitney, 38 Me. 174; 61 Am. Dec. 239.

conversion of timber, it was declared that the measure of damages was the value of the timber immediately after it was cut and had become personal property, there being no "evidence of a conversion by the defendants after they began to take away the timber from the place where it originally stood."[56]

§ 1196. Cutting and conversion of trees—Michigan.—One of the first cases in which this question arose was that of Winchester v. Craig,[57] which has been frequently cited in various decisions in the United States. This was also an action of trover for the conversion of timber which had been cut by mistake from the land of another in Michigan and transported to Toledo, Ohio. The value of the timber standing was about a dollar and a half per thousand. The cost of the various labors and expenses incurred between the time of, and including, the cutting to the landing of the lumber in Toledo was about nine dollars per thousand. Its value in Cleveland was about twelve dollars per thousand. It was held, in this case, that a ruling was proper which fixed the measure of damages at either the value when first severed from the realty together with the profits which might have been derived from its value in the ordinary market, or the market value at Toledo less such sum as had been expended by the defendants in bringing it there and putting it in condition for sale, together with interest from the date of conversion. This case contains a very thorough and exhaustive discussion of the question and reviews many of the cases where the same question has been considered.[58] In a subsequent case in this state,[59] which was also an action of trover, it did not appear that there was any wilful or negligent trespass on the part of the defendant or the company's employees in cutting the timber from plaintiff's

[56] See Cushing v. Longfellow, 26 Me. 306, which was an action of trespass de bonis, and where the damages were limited to the value of the trees at the moment they were severed from the land.

[57] 33 Mich. 205.

[58] See also Gates v. Rifle Boom Co., 70 Mich. 309; 38 N. W. 245; Isle Royale Mining Co. v. Hertin, 37 Mich. 332; 26 Am. St. Rep. 520; Stephenson v. Little, 10 Mich. 433; Arpin v. Burch, 68 Mich. 619; 32 N. W. 681; Tuttle v. White, 46 Mich. 485; 9 N. W. 528.

[59] Ayres v. Hubbard, 71 Mich. 594; 40 N. W. 10.

land, and it was held that the measure of damages was the value of the timber on the land.[60] But in a later case it is declared that a trespasser, however innocent, acquires no property in logs cut on the land of another, nor lien thereon for the labor and expense of cutting, nor can he recover such value in an action of trover or assumpsit; and that the owner of the timber so cut has the right to reclaim the logs if he can and, if he does, the trepasser though cutting the lumber in good faith has no claim upon the owner either in a legal or equitable sense, and that there is no injustice in holding that such trespasser must lose the labor he has expended in converting another's trees into logs.[61] The court in this case cites Gates v. Rifle Boom Co.,[62] which holds in substance the same as just stated in text, but declares that "if the owner sees fit to bring an action of trespass or trover instead of regaining his property, he voluntarily puts himself within the rule of damages prevailing in such actions and thereby elects to receive only a just and fair compensation for his property as it was before the trespasser intermeddled with it."

§ 1197. Cutting and conversion of trees—Minnesota.—In a somewhat recent case in Minnesota,[63] which was an action to recover for the value of timber cut and carried away from the land of the plaintiff, it was declared that the rules as established by the earlier cases in that state,[64] and which had been adopted by the courts of that state were, first, that the full value of the property, at the time and place of demand, might be recovered where the defendant was a wilful trespasser; second, that if he was an unintentional or mistaken trespasser or, as had been expressed in Whitney v. Huntington,[65] if he honestly and reasonably believed his conduct was rightful, the value of the property at the time it was taken, which would be in the case of timber

[60] See Thompson v. Moiles, 46 Mich. 42; 8 N. W. 577, which was an action of trespass quare clausum for entering land and cutting timber.

[61] Busch v. Fisher, 89 Mich. 192; 50 N. W. 788. This appears to be an action of replevin.

[62] 70 Mich. 309; 38 N. W. 245, action of trover.

[63] King v. Merriman, 38 Minn. 47; 35 N. W. 570.

[64] Whitney v. Huntington, 37 Minn. 197; 33 N. W. 561; Nesbitt v. St. Paul Lumber Co., 21 Minn. 491.

[65] 37 Minn. 197; 33 N. W. 561.

the value of the timber standing; and third, if the defendant was an innocent purchaser from a wilful trespasser, then the value of the property at the time of the purchase.[66] In one of these cases the court said in reference to the question of good faith:[67] "We should first determine what is that quality of good faith in the trespasser which thus affects the measure of damages. We think that no more is necessary than that the trespasser, without culpable negligence or a wilful disregard of the rights of others, shall have acted in the honest and reasonable belief that his conduct was rightful. Notice of an adverse claim would be an important element to be considered; but that alone would not necessarily place the wrongdoer in the position of a culpably wilful trespasser. The term 'good faith' has been employed in the authorities upon this subject to characterize the acts of one who, while legally a wrongdoer, yet acted in the honest belief that his conduct was rightful."[68]

§ 1198. Cutting and conversion of trees—Mississippi.—In Mississippi,[69] in a case where an action of replevin had been brought to recover a large lot of staves which had been made from timber cut from plaintiff's land, the measure of damages for the wrongful taking or detention of property was held to be determined by the animus of the conversion and was declared to be the value of the property at the time it was taken, if the act of taking was in good faith, but that punitive damages might be given, where the taking was characterized by oppression or malice and that, in such case, no allowance would be made for any increased value which might have been placed upon the property by skill or labor bestowed by the defendant. And the same rule was held to obtain whether the action be trespass, trover or replevin. The court said in this case: "The tendency of the modern cases is to hold that if by mistake or without intentional wrong trees are cut and converted into some other forms more valuable, the jury ought to deduct from the estimation the value of the time, labor and skill bestowed upon them by the defend-

[66] See also Himnan v. Heyderstadt, 32 Minn. 250; 20 N. W. 155.

[67] Whitney v. Huntington, 37 Minn. 197; 33 N. W. 561.

[68] Per Dickinson, J.

[69] Heard v. James, 49 Miss. 236.

ant. But on the other hand if the defendant has been a wanton or wilful trespasser, or if after his mistake as to the ownership was discovered he does not act fairly with the plaintiff, then the jury may disregard a partial or full estimation of the enhanced value." [70]

§ 1199. Cutting and conversion of trees—New Hampshire.—In New Hampshire,[71] in a case where an action of trover had been brought for the cutting of trees from the plaintiff's land, it was declared that though the defendant was negligent, yet, where there were no elements of fraud or malice, the measure of damages was the value of the trees immediately after they were severed from the realty. It was also said in this case that "the weight of authority in this country is in favor of the rule which gives compensation for the loss, that is, the value of the property at the time and place of conversion with interest after, allowing nothing for value subsequently added by the defendant when the conversion does not proceed from wilful trespass, but from the wrongdoer's mistake or from his honest belief of ownership in the property, and there are no circumstances showing a special and peculiar value to the owner or a contemplated special use of the property to him. . . . In cases of conversion by wilful act or by fraud, the value added by the wrongdoer after conversion is sometimes given as exemplary or vindictive damages or because the defendant is precluded from showing an increase of value by his own wrong and from claiming a corresponding reduction of damages. The contention of the plaintiff that he is entitled to recover the value of the logs increased by the expense of cutting and removal to the mill at Walfeborough, because as the case finds the defendant's acts constituting the conversion were negligent, cannot be sustained on any ground warranting vindictive damages. The cutting and taking the logs was not a wilful trespass, nor does it appear that the defendant's want of reasonable care amounted to a fraud. No malice is shown nor were there other facts of outrage on which such damages could be predicated." [72]

[70] Per Simrall, J.

[71] Beede v. Lamprey, 64 N. H. 510; 15 Atl. 133; 10 Am. St. Rep. 426.

[72] Per Allen, J. See also Foote v. Merrill, 54 N. H. 490; 20 Am. St. Rep. 151.

§ 1200. Cutting and conversion of trees—New York.—In one of the earlier cases in New York,[73] which was an action to recover damages for the wrongful cutting of timber on plaintiff's land and carrying away of same, the plaintiff was held not restricted to the value of the trees as they stood, but it was declared that he might recover the value of the logs, into which the trees had been cut, at the time and place of the defendant's taking them from the land. Again, in Johnson v. Kathan,[74] which was an action to recover damages for trees cut down and taken from premises belonging to and in possession of the plaintiff, it was declared that the removal of the timber from the plaintiff's premises constituted the conversion and that the value of the timber at such time was the measure of damages, and it was held that the jury should not be permitted to guess what such value might be from evidence of the value at another time and place. In this case no evidence was given of the value of the timber on plaintiff's land, nor of the cost of removal from there to the place where taken, though evidence of value at this latter place was given, and there being no evidence to justify a substantial verdict for the plaintiff, and such a verdict having been given, judgment was ordered reversed.

§ 1201. Cutting and conversion of trees—North Carolina.—In North Carolina, in an action of trespass for cutting down timber trees, the measure of damages is the value of the trees when they are first cut down, and become chattels, the price for which they could have been sold at such time being declared to be the pecuniary loss.[75] In this case the rule was said not to apply in case of cutting ornamental trees or to the cutting of timber, with any circumstances of aggravation.

§ 1202. Conversion of wheat in field—Iowa.—In Iowa, in an action for the unlawful conversion of corn growing in a field, it was held that the trespasser was not entitled to any allowance for labor bestowed upon the corn, such as husking and cribbing.[76] The facts in this case were, that the defendant had wrong-

[73] Firmin v. Firmin, 9 Hun, 571.
[74] 88 Hun (N. Y.), 456; 34 N. Y. Supp. 864; 68 N. Y. St. R. 797.
[75] Bennett v. Thompson, 13 Ired. L. (N. C.) 146.
[76] Stuart v. Phelps, 39 Iowa, 14.

fully levied upon a crop of corn, that he had it husked and cribbed, thereby increasing its value for which labor he claimed he should be allowed in estimating the damages. But the court declared: "If the levy was not authorized and amounted to a wrongful conversion, the defendant became a trespasser and he is not entitled to compensation for husking and cribbing, notwithstanding those acts may have increased the value of the property." [77]

§ 1203. Conversion of corn in field—Indiana.—In Indiana, the question first arose in an action for the conversion of wheat, the defendant having forcibly taken possession of it as it stood in the field, driven the owner away, harvested and sold it.[78] In this case the measure of damages was held to be, provided the plaintiff was content therewith, the value of the wheat at the time of sale, which was declared to be the time of conversion, and in the form in which sold, the defendant not being allowed to show in reduction of the damages, the value of his own labor in harvesting and threshing the crop. The court, however, expressed the opinion that the plaintiff was entitled to the highest value of the wheat at any time between the taking and the sale.

§ 1204. Severance of minerals—English rule.—In England the rule as to the measure of damages in actions for mining and carrying away ore from the premises of another seems to be on the line of what was stated by Baron Parke, in Wood v. Morewood,[79] in his direction to the jury which we have noted in a preceding section.[80] This rule has in substance been followed in subsequent decisions, and, from its construction and application in the various cases where this question has arisen, the rule at the present time in England appears to be that where a person has mined and carried away ore from the land of another and converted it to his own use and he has not been guilty of fraud, but has acted in good faith, such as, for in-

[77] Per Day, J., citing Baker v. Wheeler & Martin, 8 Wendell, 505; Silsbury v. McCoon, 3 Comstock, 379.

[78] Ellis v. Wire, 33 Ind. 127; 5 Am. St. Rep. 189.

[79] 3 Ad. & El. N. S. 440 n.

[80] See sec. 1130, 1131 herein.

stance, a mistake in the boundary line between his and the adjacent property, the measure of damages will be the value of the ore at the same rate as if the mines had been purchased by the person converting such ore at the par market value thereof. If, however, the person taking the ore has been guilty of fraud or negligence, or has acted wantonly or maliciously, then the damages may be assessed at the value at the time of conversion, with no allowance for the digging or the separating of the ore from the earth or other substances.

§ 1205. Severance of minerals—American rule.—In the United States the rule followed in most jurisdictions is in substance the same as in England, the courts here having generally held that, in case of the conversion of minerals by one who has acted wantonly, maliciously, or in a fraudulent or negligent manner, the measure of damages is the value of the mineral at the time of conversion, no allowance being made for labor expended in the digging or severance of the ore. Where, however, the ore has been mined and converted, under a mistaken idea of the right thereto, there being no fraud, negligence, malice or wantonness in the conduct of the person mining and converting it, the courts, though they in substance have held the same as is held in England in such cases, yet they reach the same result by apparently different paths. In Pennsylvania, in a case where an action of trover had been brought for coal mined and converted, the measure of damages was held to be the value of the ore in place, together with compensation for any damage done to the land by the mining. In a subsequent case in this state this case is referred to as one being brought in trover, but treated as an action quare clausum fregit for injury to land not wilful.[81] In Massachusetts, in an action in equity praying for relief for injury to land, the measure of damages was held similar to that stated in the Pennsylvania cases.[82] In California, Iowa and Nevada, the value of the mineral taken out is declared to be the measure of damages, in such a case, less the reasonable cost of mining the same. In Illinois and Maryland, however, the courts do not seem inclined to allow for labor expended in digging and severing the mineral in any

[81] See sec. 1188 herein.

[82] See sec. 1185 herein.

case. In these states the measure of damages seems, even though the defendant acted in good faith and in the belief of his right, to be based on the value of the mineral when it first becomes a chattel, no allowance being made for expense of digging or severing the mineral.

§ 1206. Cutting and conversion of trees—Mistake.—The courts again are not in harmony as to the measure of damages for the cutting and conversion of trees where the defendant acted in good faith. In a case before the United States circuit court,[88] it was said by Judge Dillon that in case a person in good faith cut and converted timber on government lands in the belief he was cutting upon his own lands, it might be the court would be warranted in allowing the value of the logs when first severed, where before commencement of the action they had been increased many fold in value by the labor expended upon them, but as this question was not before the court, the learned judge did not pass upon it and said he left it open for future consideration. In Mississippi the court declares that where timber has been cut and converted by mistake and by the time, skill and labor of the wrongdoer has been rendered more valuable, an allowance should be made for the time, labor and skill bestowed, and a similar doctrine has been stated in Arkansas. In Michigan, Minnesota and New Hampshire, the measure of the damages, in such a case, seems to be the value of the timber in situ. In Alabama, Georgia, Maine, New York and North Carolina, the rule seems to be the value of the trees immediately after they are severed and become chattels.

§ 1207. Cutting and conversion of trees by mistake—General rule.—The rule which seems to be supported by the weight of authority in the United States is that the plaintiff in such an action is entitled to recover the value of the trees immediately after they are severed and become chattels, although in some states the courts allow a recovery based only on the value of the timber standing.

§ 1208. Rules in case of trees differ from rule where

[88] Bly v. United States, 4 Dillon, 465.

minerals converted.—It will be noticed that the rules for the measure of damages, in actions to recover for the cutting and conversion of trees, as supported by the weight of authority, seems to differ from that generally followed where minerals have been severed and converted, the severance in both cases being in good faith. That the majority of the courts seem to follow one rule, in case of trees, and a different one, for minerals, at first seems peculiar. As we have already stated, the damages recoverable, where minerals are converted under such circumstances, is based on the value of the mineral in place at the fair market value as if the wrongdoer had purchased the same or, as is declared in some cases, at the value of the mineral at the pit mouth, less the cost of digging, severing and transporting it there. No attempt has been made by the courts to distinguish between cases where trees are converted and minerals are converted. It merely happens that no cases have arisen on both classes of property in the same jurisdiction. The authors themselves have separated the classes of property for the purpose of presenting the matter more logically and not because of the belief that a different rule should obtain in the different classes of property. The same principles seem to underlie both propositions. There is no reason for applying one rule in case of minerals and another in case of trees, and it is probable that, if in those courts which have already decided upon one class of cases the question should arise in the other class, the courts would adhere to the same rule as had already been laid down in their particular jurisdiction.

§ 1209. Good faith—What amounts to.—The good faith, which is necessary to enable a wrongdoer to obtain the benefit of the rule of mitigated damages, seems to be an honest and reasonable belief on his part that his conduct was rightful.

§ 1210. Severance from freehold—General rule where wilful.—In actions to recover damages for the severance of property from the freehold and conversion thereof, the decisions uniformly support the rule that, if the severance and conversion has been wilful and intentional, the plaintiff may recover

the value of the property at the time of the conversion, with no allowance to the wrongdoer for any labor bestowed upon the same.

§ 1211. When conversion takes place.—As to the point of time when the conversion takes place, no definite rule can be stated. In some cases it may be when the property has been severed from the freehold and becomes a chattel. In other cases it may be when it is removed from the land of the owner. Again, it has been considered, where the property converted has been sold, as of the time of sale. As is said in one case, the trouble is not in the rule but in the application of it to the facts of each particular case.[81] Different states of facts in different cases may justify the finding of the conversion to have taken place at different times, and therefore the time when the conversion takes place for the purpose of estimating the damages may be said to depend upon the facts of the particular case.

[81] Wing v. Milliken, 91 Me. 387; 40 Atl. 138; 64 Am. St. Rep. 238, per Foster, J., case noted in sec. 1195 herein.

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[84] Wing v. Milliken, 91 Me. 387; 40 Atl. 138; 64 Am. St. Rep. 238, per Foster, J., case noted in sec. 1195 herein.

CHAPTER XLIX.

DETINUE AND REPLEVIN.

§ 1212. Distinction between detinue and replevin.
1213. Measure of damages in detinue.
1214. Replevin—Measure of damages—Generally.
1215. Replevin—Measure of damages — Property not returned.
1216. Where property is lost or destroyed.
1217. Time of assessing value.
1218. Nominal damages.
1219. Consequential damages—Expenses—Attorney's fees.
1220. Consequential and remote damages.
1221. Damages for wrongful arrest not recoverable.
1222. Exemplary damages.
1223. Interest as damages.
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1233. Replevin by seller—Conditional sale.
1234. By vendor—Lease with privilege of purchase.
1235. Mortgagee and third party.
1236. Replevin by tenant of goods distrained for rent — Double damages.
1237. Evidence — Value — Sale price.
1238. Evidence — Opinions as to value.
1239. Evidence—Ownership — Variance.
1240. Mitigation of damages—Set-off.
1241. Right of defendant to assessment of damages where no service on him.
1242. Where property found in each party.

§ 1212. Distinction between detinue and replevin.—Detinue is an action to recover possession of personal property, which originally came lawfully into the possession of the defendant, and also damages for its tortious detention by him, or if the recovery of the property cannot be had, value of the same may be recovered.[1] Four elements are said to be necessary to the maintenance of the action, that is: (1) that the defendant came into lawful possession of the goods; (2) that the plaintiff have a property; (3) that the goods have some value; and

[1] 3 Blacks. Com. 151; Waite v. Dolby, 8 Humph. (Tenn.) 406.

(4) that they be ascertained in point of identity.[2] This action is now, however, in most jurisdictions embodied in the actions of replevin and trover. The action of replevin may be generally defined as an action to recover possession of property, which has been tortiously taken and detained, and damages for such wrongful acts. "The general procedure is that the goods are delivered back to the party replevying who is required to give a bond sufficient for the value of the property. If the action be decided in favor of the plaintiff, he, already having possession, may recover damages in addition, but if the action be determined in favor of the defendant, the goods are again returned into his custody, and damages may be awarded to him.[3] In several states the remedy to recover possession of personal property or damages for its detention is provided for by an action of claim and delivery in which, however, the damages are subject to the same general rules as in the other actions therefor at common law.

§ 1213. Measure of damages in detinue.—In detinue, where the property is returned, the plaintiff may recover as damages the value of the use of the property detained, during the period of its unlawful detention,[4] or if the property cannot be obtained or is not returned, he may recover the value thereof.[5] In case, however, the plaintiff has only a special or part interest in such property, his recovery will be limited to the value of such interest.[6]

§ 1214. Replevin — Measure of damages — Generally.—Where the question as to the right to the property is decided

[2] 3 Blacks. Com. 153.

[3] 3 Blacks. Com. 145–149. See Robinson v. Richard, 45 Ala. 354; Washburn v. Roberts, 72 Ind. 213; Merritt's Exrs. v. Merritt, 1 Mart. (La.) 18; Hunt's Admr. v. Martin's Admr., 8 Gratt. (Va.) 578.

[4] Glascock v. Hays, 4 Dana (Ky.), 58. See also Merritt's Exrs. v. Merritt, 1 Mart. (La.) 18. But see Morgan v. Cone, 1 Dev. & B. (N. C.) 234.

[5] Johnson v. Marshall, 34 Ala. 522; Miller v. Jones, 29 Ala. 174; White v. Ross, 5 Stew. & P. (Ala.) 123; Penny v. Davis, 3 B. Mon. (Ky.) 313; Freeman v. Lucket, 2 J. J. Marsh. (Ky.) 390; Stamps v. Beaty, Hard (Ky.), 337; Whitfield v. Whitfield, 40 Miss. 352; Murphy v. Moore, 4 Ired. Eq. (N. C.) 118; Clapp v. Walters, 2 Tex. 130.

[6] Glascock v. Hays, 4 Dana (Ky.), 58; McGinnis v. Savage, 29 W. Va. 362; 1 S. E. 746.

in favor of the plaintiff, if he has obtained possession of the same, the judgment should be for an affirmance of such possession together with such damages as may have been sustained by him by reason of the wrongful taking and detention thereof by the defendant.[7] And where the plaintiff is in possession of the property at the time of the trial, the judgment should not direct its return to him, or in case a return cannot be had, a recovery of the value.[8] But if the property has not been delivered to him, the judgment is generally in an alternative form, providing either for a return of the property or its value, where not returned, together with damages for the detention of the same.[9] And similarly if the defendant prevails, he is entitled to recover possession if the property has been taken from him, or if the property is not returned he may recover its value with damages for the taking and detention.[10] As to the value it has been decided that the plaintiff is bound by the valuation of the property which has been made by him in the suit,[11] though it will not operate to affect the defendant in his recovery.[12] Where, however, the property has been delivered to the plaintiff, and the finding is in favor of the defendant, it has been held that the latter cannot recover damages for the taking and withholding of the same, unless he has set up in his answer a claim for damages.[13]

§ 1215. Replevin—Measure of damages—Property not

[7] McGavock v. Chamberlain, 20 Ill. 219; Walls v. Johnson, 16 Ind. 374; Stevens v. Tinte, 104 Mass. 333; Allen v. Fox, 51 N. Y. 562; Webb v. Hecox, 27 Misc. (N. Y.) 169; 58 N. Y. Supp. 382; Young v. Willett, 8 Bosw. (N. Y.) 486; Fisher v. Whoollery, 25 Pa. St. 199; Nicholas Ins. Co. v. Alexander, 10 Humph. (Tenn.) 383.

[8] Marrinan v. Knight, 7 Okla. 419; 54 Pac. 656.

[9] Jetton v. Smead, 29 Ark. 372; Kehoe v. Rounds, 69 Ill. 351; Anderson v. Tyson, 14 Miss. 244; Brewster v. Silliman, 38 N. Y. 423.

[10] MacLachlan v. Pease, 171 Ill. 527; 49 N. E. 714, aff'g 66 Ill. App. 634; Gordon v. Jenney, 16 Mass. 465; Suydam v. Jenkins, 3 Sandf. (N. Y.) 614; Kimball Co. v. Redfield, 33 Ore. 292; 54 Pac. 216.

[11] Schmidt v. Nunan, 63 Cal. 371; Tuck v. Moses, 58 Me. 462; Tiedman v. O'Brien, 36 N. Y. Super. Ct. 539; Middleton v. Bryan, 3 M. & S. 155. The fact, however, that the judgment for the plaintiff exceeds the amount alleged in the petition will not require a reversal of such judgment, but it may be corrected by a proper reduction. Brook v. Bayless, 6 Okla. 568; 52 Pac. 738.

[12] Thomas v. Spoffard, 46 Me. 409.

[13] Whitcomb v. Hoffman, 14 Hun (N. Y.), 335. But see Woodruff v. Cook, 25 Barb. (N. Y.) 505.

returned.—In an action of replevin it frequently happens that the property, for some reason, cannot be or is not returned to the prevailing party and, under such circumstances, there may be a recovery of the value of the property together with damages for its detention.[14]

§ 1216. Where property is lost or destroyed.—If the property be lost or destroyed while in the possession of the person wrongfully withholding the same, this will not operate to lessen his liability, but the full measure of damages may be recovered from him, the same as if such result had not accrued.[15] So such is the rule where property is destroyed by fire though through no fault of the person holding the same.[16] And it has also been applied where the property in question was ice which melted.[17]

§ 1217. Time of assessing value.—As a general rule the value of the property is assessed as of the time of taking, which will operate, in case a verdict is found in favor of the plaintiff replevying, to fix the value at the time of the taking by the defendant, but if the verdict be in favor of the latter, the value will be assessed as of the time when the property was taken under the writ,[18] though in some cases the value at the time of trial is

[14] Hisler v. Carr, 34 Cal. 641; Garrett v. Wood, 3 Kan. 231; Benesch v. Weil, 69 Md. 276; Baum Iron Co. v. Union Sav. Bank, 50 Neb. 387: 69 N. W. 939; Bercich v. Marye, 9 Nev. 312; O'Meara v. North Amer. Min. Co., 2 Nev. 112; Frazier v. Fredericks, 24 N. J. L. 162; New York Guaranty & Indem. Co. v. Flynn, 55 N. Y. 653; Brewster v. Silliman, 38 N. Y. 423; Phillips v. Melville, 10 Hun (N. Y.), 211; Scott v. Elliott, 63 N. C. 215; McFadyen v. Masters (Okla.), 56 Pac. 1059; Findlay v. Knickerbocker Ice Co., 104 Wis. 375; 80 N. W. 436; Lewis v. Teale, 32 Up. Can. Q. B. 108; Deal v. Potter, 26 Up. Can. Q. B. 578.

[15] Schott v. Youree, 142 Ill. 233; 31 N. E. 591; Scott v. Hughes, 9 B. Mon. (Ky.) 104; Haile v. Hill, 13 Mo. 612; Suydam v. Jenkins, 3 Sandf. (N. Y.) 614; Gibbs v. Bartlett, 2 W. & S. (Pa.) 34; Bobo v. Patton, 6 Heisk. (Tenn.) 172; 19 Am. St. Rep. 593; Middleton v. Bryan, 3 Maule & S. 158.

[16] McPherson v. Acme Lumber Co., 70 Miss. 649; 12 So. 857; George v. Hewlett, 70 Miss. 1; 12 So. 855.

[17] Findlay v. Knickerbocker Ice Co., 104 Wis. 375; 80 N. W. 436.

[18] Neeb v. McMullan, 98 Iowa, 718; Hurd v. Gallaher, 14 Iowa, 394; 68 N. W. 638; Garrett v. Wood, 3 Kan. 231; Washington Ice Co. v. Webster, 62 Me. 341; 16 Am. St. Rep. 462; Sherman v. Clark, 24 Minn. 37; Berthold v. Fox, 13 Minn. 462; Barnes v. Bartlett, 15 Pick. (Mass.) 71; Miller v. Whitson, 40 Mo. 97; Woodburn v. Cogdall, 39 Mo. 228; Hutchins v.

said to be the proper valuation.[19] The rule allowing the value at the time of taking is generally applied in those cases where the right to the possession of the property is found to be in the defendant, but for some reason he is unable to obtain possession or it is impossible to return the same to him. As to the application of the rule in such cases, the words of the court in a recent case are pertinent.[20] "The plaintiff insists that the instruction of the court as to the measure of damages is erroneous in that it directs the jury to assess the defendant's damages at the value of the property at the time it was taken. The general rule in this state is that when either the plaintiff or the defendant in a replevin suit has the property in his possession and the finding is against him, the value of the property should be assessed as of the date of the trial. The reason for the rule is that the usual or statutory judgment under such facts is that the prevailing party have judgment for the return of the property or the payment of its assessed value at his election. Therefore the equities of the statute require that the value of the property be assessed at the date of the trial and not at the commencement of the action. And for the depreciation in value, if any, after the seizure, the prevailing party is supposed to be compensated in his recovery of damages for the detention of the property.[21] But the foregoing decisions and also the statute itself, contemplate that the party in possession of the property will have it at the trial to abide the judgment of the court. When it can

Buckner, 3 Mo. App. 595; Nitz v. Bolton, 71 Mich. 388; 39 N. W. 15; Heard v. James, 49 Miss. 236; Dodge v. Rumels, 20 Neb. 33; 28 N. W. 849; Crossley v. Hojer, 11 Misc. (N. Y.) 57; 63 N. Y. St. R. 440; 31 N. Y. Supp. 837; Suydam v. Jenkins, 3 Sand. (N. Y.) 614; Green v. Bauer, 15 Pa. Super. Ct. 372; Findlay v. Knickerbocker Ice Co., 104 Wis. 375; 80 N. W. 436; Sweeney v. Lomme, 22 Wall. (U. S.) 208.

[19] Kreibohm v. Yancey, 154 Mo. 67; 55 S. W. 260; Kirkendall v. Hartsock, 58 Mo. App. 234; Chapman v. Kerr, 80 Mo. 158; Hinchey v. Koch, 42 Mo. App. 230; Miller v. Bryden, 34 Mo. App. 602; Kendall Boot & S. Co. v. Rain, 46 Mo. App. 58; Brewster v. Silliman, 38 N. Y. 423; Reynolds v. Walker, 1 Wash. (Va.) 164.

[20] Willison v. Smith, 60 Mo. App. 372, per Biggs, J.

[21] Citing Pope v. Jenkins, 30 Mo. 528; Schultz v. Hickman, 27 Mo. App. 21; Hoester v. Teppe, 27 Mo. App. 207; Anchor Milling Co. v. Walsh, 20 Mo. App. 107; Chapman v. Kerr, 80 Mo. 158; Mix v. Kepner, 83 Mo. App. 362; Richey v. Burns, 83 Mo. 362.

thus be preserved, its value at the trial can be determined by actual inspection. But suppose it has been sold or otherwise disposed of, how is it possible to ascertain its present value? And how can the court carry into effect the statutory judgment of a return of the property or its assessed value as the prevailing party may elect? A judgment of this kind under such circumstances would be a farce."[22] Again, in other decisions, the rule has been affirmed that where a writ of restitution is issued by virtue of which the defendant demands the goods but the plaintiff refuses to restore them, the measure of damages is the value of the goods at the time of demand,[23] as is also the case where the writ is issued in behalf of the plaintiff.[24]

§ 1218. Nominal damages.—The principle of damages being generally to compensate the party injured for such loss as he has sustained, it therefore follows that, if no injury has been sustained or there has been only a slight or technical injury, nominal damages only will be awarded. So where the defendant recovers in an action of replevin he will be limited to nominal damages where the property was not taken from his possession,[25] or where there was only a momentary detention.[26] So also such damages only are recoverable for the detention of money securities which bear interest, but upon which no interest has been paid during the period of detention,[27] or where the party entitled to the property fails because of a mere technicality,[28] or where there is no evidence as to the value of the property or of its use.[29] And again, where in replevin by execution defendants for property levied on, a judgment is recovered by the sheriff for the value of such property, only nominal damages can be recovered by the execution plaintiff in an action on the redelivery bond where such judgment is paid.[30] But an

[22] See also Jennings v. Sparkman, 48 Mo. App. 246.

[23] Swift v. Barnes, 16 Pick. (Mass.) 194.

[24] Morris v. Coburn, 71 Tex. 406; 9 S. W. 345.

[25] Stoeckel v. Russell, 6 Houst. (Del.) 32, 142.

[26] Whitman v. Merrill, 125 Mass. 127.

[27] Bartlett v. Buckett, 14 Allen (Mass.), 62.

[28] Treat v. Staples, 1 Holmes (U. S.), 1; Harman v. Goodrich, 1 Green (Iowa), 14.

[29] Sopris v. Webster, 1 Colo. 508.

[30] Stuart v. Trotter, 75 Iowa, 96; 39 N. W. 212.

award of nominal damages in favor of the defendant, in an action of replevin, will not preclude a recovery from the surety on the bond of such damages as have been sustained by him.[31]

§ 1219. Consequential damages — Expenses — Attorney's fees.—The expenses of taking and removing the property by the sheriff are to be treated as disbursements and should be taxed with the costs in the action, and not assessed as a part of the damages,[32] nor should attorney's fees be included in the damages.[33] Expenses, however, reasonably incurred by the owner in the pursuit of and endeavor to recover his property, will generally be allowed.[34] So the expense of sending a person to the defendant for the purpose of making a demand for the property is a proper item in estimating the damages.[35] And under a statute which provided that, in case of a recovery by the plaintiff in replevin, such damages should be assessed as had been sustained by the unlawful taking and detention of the property,[36] it was held that the plaintiff, where entitled to

[31] Gould v. Hayes, 71 Conn. 86; 46 Atl. 930.

[32] Young v. Atwood, 5 Hun (N. Y.), 234. See also Sinski v. Brust, 66 App. Div. (N. Y.) 34; 72 N. Y. Supp. 922. As to proceedings in connection with allowance of costs, see Loomis v. Taylor, 4 Day (Conn.), 141; Rapid Safety Filter Co. v. Wyckoff, 19 Misc. (N. Y.) 351; 43 N. Y. Supp. 490; Wolff v. Moses, 57 N. Y. Supp. 696; 26 Misc. (N. Y.) 500; Schoening v. Buchanan, 14 Abb. Pr. (N. Y.) 185, 468.

[33] Hays v. Windsor, 130 Cal. 230; 62 Pac. 395; Black v. Hilliker, 130 Cal. 190; 62 Pac. 481; Winsted v. Hulme, 32 Kan. 568; Cowden v. Lockridge, 60 Miss. 385; Mix v. Kepner, 81 Mo. 93; Wright v. Broome, 67 Mo. App. 32; Trimble v. Keer-Rountree Mercantile Co., 56 Mo. App. 683; Laughlin v. Barnes, 76 Mo. App. 265, denying reh'g in 76 Mo. App. 258; 1 Mo. App. Rep. 492; Loven v. Parson, 127 N. C. 301; 37 S. E. 271; Knight v. Beckwith Commercial Co. (Wyo.), 46 Pac. 1094. They may be recovered as damages in an action of debt on the bond (Scott v. Rogers, 56 Ill. App. 571), but evidence thereof in such a case is inadmissible where the declaration contains no allegation in reference thereto. Edwin v. Cox, 61 Ill. App. 567.

[34] Cain v. Cody (Cal.), 29 Pac. 778; Yelton v. Slinkard, 85 Ind. 190; Mitchell v. Burch, 36 Ind. 529; Washington Ice Co. v. Webster, 62 Me. 341; Stevens v. Tuite, 104 Mass. 328; Bennett v. Lockwood, 20 Wend. (N. Y.) 223; Northrup v. Cross, 2 N. D. 433; 51 N. W. 718; Parroski v. Goldberg, 80 Wis. 339; 50 N. W. 191. But see Taylor v. Morton, 61 Miss. 24.

[35] Davis Sew. Mach. Co. v. Best, 50 Hun (N. Y.), 76; 23 N. Y. St. R. 876; 4 N. Y. Supp. 510.

[36] How. (Mich.) Ann. Stat. sec. 8341.

recover in an action of replevin for the improper removal of a building from his land, should be allowed in estimating the damages, the expense of replacing the building on his land.[37] But there can be no recovery for time spent in commencing the action.[38] And to recover for expenses incurred in the pursuit of property or for the amount expended in replacing the goods, such damages must be specially pleaded.[39]

§ 1220. Consequential and remote damages.—Where the right to the possession of property is found to be in the defendant and he is entitled to a return thereof, he may recover damages for the interruption of his possession and the loss of the use of the goods.[40] But damages for the loss of customers are declared to be too remote and contingent to be recoverable.[41] And in an action of claim and delivery, where damages are alleged owing to the unlawful detention of a threshing machine, anticipated profits from contracts for threshing are declared to be too remote and uncertain to furnish a proper basis for compensation.[42] And it has also been decided that defendant cannot, in replevin for a building which has been removed, recover damages for injury to personal property therein occasioned by the removal, they not being such damages as might reasonably have been anticipated.[43] Nor are damages recoverable for the loss of a farm owing to inability to make payments thereon, because of the deprivation of farm implements which were wrongfully seized

[37] Brynes v. Palmer, 113 Mich. 17; 71 N. W. 331; 4 Det. L. N. 161. In this case it was said: "Plaintiff was permitted to recover as part of her damages, the expense of replacing the building on her lot. This is complained of. How. Ann. Stat. sec. 8341, provides that on recovery by plaintiff the same jury shall assess the damages which he has sustained by the unlawful taking and detention or by the unlawful detention of the property. Surely the plaintiff suffered damages by the taking of her building from her property to another part of town. It is suggested that this charge was properly a part of the taxable costs, but we know of no authority for the officer to do more than deliver the building to plaintiff." Per Montgomery, J.

[38] Blackwell v. Acton, 38 Ind. 425.

[39] Arzaya v. Villalla, 85 Cal. 191; 24 Pac. 656; Dutro v. Kennedy, 9 Mont. 101; 22 Pac. 763.

[40] Washington Ice Co. v. Webster, 62 Me. 341; 16 Am. Rep. 462.

[41] Washington Ice Co. v. Webster, 62 Me. 341; 16 Am. Rep. 462.

[42] Williams v. Wood, 55 Minn. 323; 56 N. W. 1066.

[43] Jameson v. Kent, 42 Neb. 412; 60 N. W. 879.

in replevin by a chattel mortgagee.[44] So also, evidence by the defendant, in an action of replevin, that he lost much time and had been deprived of the replevied goods and had been delayed in the payment of his debts, is not sufficient to show the damage resulting from the wrongful suing out of the writ.[45] And again, special damages for injury to property and the interruption of business must be specially pleaded to permit plaintiff to recover therefor.[46]

§ 1221. Damages for wrongful arrest not recoverable.—Though a wrongful arrest may be made for the purpose of compelling a delivery of the property, damages therefor are not, however, recoverable in a replevin suit.[47]

§ 1222. Exemplary damages.—As in other actions to recover damages, exemplary damages are not recoverable in replevin, in the absence of aggravating circumstances, the damages being assessed in all such cases on the basis of compensation for the injury or loss sustained. If, however, there has been vexation, oppression, or outrage in the taking or detention of the property, exemplary damages may be allowed.[48] Thus it is said in an early case in Pennsylvania:[49] "In an action of replevin where the defendant retains the property, the measure of damages is ordinarily the value of the property and damages for the detention, which is usually interest on the value from the time of taking. . . . But though this is the general, yet it is not the universal rule, for circumstances may attend the taking and de-

[44] Watson v. Mead, 98 Mich. 330; 57 N. W. 181.

[45] Hays v. Windsor, 130 Cal. 230; 62 Pac. 395.

[46] Armagost v. Rising, 54 Neb. 763; 75 N. W. 534. See Davis Sew. Mach. Co. v. Best, 50 Hun (N. Y.), 76. Such damages are not recoverable by defendant on a finding in his favor in replevin on a plea of property. McCabe v. Morehead, 1 Watts & S. (Pa.) 513.

[47] Hodges v. Nall, 66 Ark. 135; 49 S. W. 352.

[48] Butler v. Mehrling, 15 Ill. 488; Powers v. Florance, 7 La. Ann. 524; Heard v. James, 40 Miss. 236; Brizsee v. Maybee, 21 Wend. (N. Y.) 144; Wiley v. McGrath, 194 Pa. St. 498; 45 Atl. 331; Herdic v. Young, 55 Pa. St. 176; 93 Am. Dec. 739; Cummings v. Gann, 52 Pa. St. 484; Schofield v. Ferres, 46, Pa. St. 438; McDonald v. Scaife, 11 Pa. St. 381; McCabe v. Morehead, 1 Watts & S. (Pa.) 513; Findlay v. Knickerbocker Ice Co., 104 Wis. 375; 80 N. W. 436.

[49] McDonald v. Scaife, 11 Pa. St. 385, per Rogers, J.

tention which will justify the jury in giving exemplary damages. The exceptions are as well settled as the rule itself. . . . In moulding the action of replevin the courts have endeavored to give the remedy such a shape as to afford the injured party essential redress. For this reason they have not confined the remedy to compensatory damages, but have under peculiar circumstances of outrage and wrong extended them far beyond these limits. And this is plain on authority. Thus in Dorris v. Barbour,[50] the court say, the value of the property is usually the measure of damages, although the jury are justifiable in going further wherever there has been an outrage in the taking or vexation and oppression in the detention." The court then considers several cases in this connection and further says: "On review of the authorities we have come to the conclusion that it is settled on reason and authority that although the ordinary rule is to give damages for the value of the goods taken with interest on the value, yet the jury may, under peculiar circumstances, go beyond it by giving exemplary damages." So where defendant who had been notified by the plaintiff of the purchase by her of certain property of her husband's, several months thereafter, purchased the same property from the husband, who had taken it unknown to the plaintiff, and upon the latter making inquiry of the defendant he pretended to be ignorant of its whereabouts and to aid her in finding it exemplary damages were properly allowed.[51] And they may also be allowed where the writ is sued out by the plaintiff fraudulently and without color of right.[52] But where the defendant had prevented the removal of ice by the plaintiff, which the former claimed under a bill of sale which would cover such ice, and the plaintiff, upon attempting to remove it, had refused to give any information to the defendant as to his right to so act, it was held in an action of replevin by the plaintiff that exemplary damages should not be given against the defendant.[53]

§ 1223. Interest as damages.—Interest on the value of the

[50] 6 S. & R. 426.

[51] Wiley v. McGrath, 194 Pa. St. 498; 45 Atl. 331.

[52] McCabe v. Morehead, 1 Watts & S. (Pa.) 513.

[53] Findlay v. Knickerbocker Ice Co., 104 Wis. 375; 80 N. W. 436.

property detained is the measure of damages for its detention in those cases where there can be no recovery for the value of the use as where the property has no usable value and there has been no diminution in value.[54] In this connection it is said in a recent case: "It is urged upon this appeal on the authority of Allen v. Fox, [55] that he was entitled to recover as damages for the unlawful detention of the property such sum as he could prove to be the value of the use of the property during the period that it was wrongfully detained. That was an action to recover the possession of a horse and what is there called the usable value of the horse was held to be a proper measure of damages for its detention. The learned judge who gave the opinion in the case admits that the interest on the value of the property at the time of the trial is generally the proper measure of damages for its wrongful detention when it consists of merchandise kept for sale and all other articles of property valuable only for sale or consumption. In actions to recover the possession of specific personal property, many cases

[54] Kelly v. Altemus, 34 Ark. 185; Gould v. Hayes, 71 Conn. 86; 40 Atl. 930; Machette v. Wanless, 2 Col. 169; Merchants S. L. & T. Co. v. Goodrich, 75 Ill. 554; McCoy v. Cowell, 40 Iowa, 457; Hurd v. Gallaher, 14 Iowa, 394; Ladd v. Brewer, 17 Kan. 204; Robinson v. Barrows, 48 Me. 186; Stevens v. Tinte, 104 Mass. 328; Wood v. Braynard, 9 Pick. (Mass.) 322; State v. Smith, 31 Mo. 566; Woodburn v. Cogdal, 39 Mo. 222; Hainer v. Lee, 12 Neb. 452; Blackie v. Cooney, 8 Nev. 41; Vincent v. Moriarty, 31 App. Div. (N. Y.) 484; 52 N. Y. Supp. 519; Keep v. Kaufman, 63 N. Y. 643, aff'g 6 J. & S. 476; Brizsee v. Maybee, 21 Wend. (N. Y.) 144; Redmond v. American Mfg. Co., 121 N. Y. 415, aff'g 24 J. & S. 372; 21 N. Y. St. R. 476; 3 N. Y. Supp. 823; New York Guaranty, etc., Co. v. Flynn, 55 N. Y. 653; Wadleigh v. Buckingham, 80 Wis. 230; 49 N. W. 745; Wegner v. Second Ward Sav. Bank, 76 Wis. 242; Bigelow v. Doolittle, 36 Wis. 115; First Nat. Bank v. Ludvigsin (Wy.), 57 Pac. 934; Peruvian Guano Co. v. Dreyfus, L. R. (1892) App. Cas. 166. But see Newman v. Cross, 108 Ga. 776; 33 S. E. 641; Potapsco Guano Co. v. Magee, 86 N. C. 350. The allowance of interest is in some states a discretionary matter. Boyce v. Cannon, 5 Houst. (Del.) 409. See also Wheeler v. McDonald, 77 Mo. App. 213; 1 Mo. App. Rep. 595. The rule stated in the text has been applied, in addition to the cases of ordinary salable property, to the case of the detention of a savings bank book, Wegner v. Second Ward Sav. Bank, 76 Wis. 242; of securities not bearing interest, McCoy v. Cowell, 40 Iowa, 458; and of certified bank checks, Merchants Sav. L. & T. Co. v. Goodrich, 75 Ill. 554.

[55] 56 N. Y. 562.

no doubt may and do arise where the interest would not furnish to the owner of the property a just or sufficient indemnity for his loss; but such cases are special and exceptional and it is scarcely possible to group them under any general rule or principle. There is a manifest difference between the case of the wrongful detention of a horse or other property which is in constant and daily use and the usable value of which is well known and readily ascertained, and property which was the character of that which was the subject of controversy in this case. Here the property was manufactured and delivered to the defendant for the purpose of sale like any other article of merchandise. It is not claimed and it is not at all likely that the plaintiff could have put the machines to any other use while the defendant detained them after the demand. When machinery in operation is taken from the owner of a factory who requires it for immediate, constant and daily use and detained by the wrongdoer, such an act would probably inflict upon the owner damages which could not be compensated by the interest on its value for the period of the wrongful detention. But when as in this case the maker of a patented machine or article desiring to introduce it into general use delivers it with a view to a sale and afterwards becomes entitled to have the same returned to him by reason of the failure of the party to whom it is delivered on trial to accept it or comply with the terms and conditions upon which it was delivered, the interest on its price or value from the time of the wrongful detention to the trial furnishes a just indemnity for the wrong and the proper rule of damages in such cases."[55] So interest may be allowed on the value of the property where a recovery of the value is authorized.[57] But it has been held that the right to the recovery of such interest is subject to the same condition as that of the recovery of the principal sum, that is, the nondelivery of the property.[58] And under the Iowa Code,[59]

[55] Redmond v. American Mfg. Co., 120 N. Y. 418–420; 31 N. Y. St. R. 573; 24 N. E. 924, per O'Brien, J.

[57] Howaker v. Vesey, 57 Neb. 413; 77 N. W. 1100. See Gamble v. Wilson (Neb.), 50 N. W. 3.

[58] Munsell v. Flood, 14 J. & S. (N. Y.) 134.

[59] Code, sec. 4178, which provides that in such actions there may be an execution either for the delivery of the property or its value as found by the jury.

an allowance of interest on the value of the property prior to the verdict is erroneous.[60] And under the California Code,[61] if damages for the detention of the property are allowed, the plaintiff cannot recover interest on the value of such property.[62]

§ 1224. Value of use.—If the plaintiff, in an action of replevin, is entitled to the use of the property in controversy and such property has a usable value, he may recover as damages for its detention, the value of such use during the time it was unlawfully or wrongfully detained.[63] This rule has been frequently applied in the case of horses.[64] And the plaintiff in

[60] Bonnot Co. v. Newman, 109 Iowa, 580; 80 N. W. 655.

[61] Cal. Code Civ. Proc. sec. 667.

[62] Garcia v. Gunn, 119 Cal. 315; 51 Pac. 684.

[63] Carroll v. Pathkiller, 3 Port. (Ala.) 281; Dunnahoe v. Williams, 24 Ark. 265; Machette v. Wanless, 2 Colo. 180; Hill v. Ginn (Del.), 43 Atl. 608; Clements v. Glass, 23 Ga. 395; Sebree v. Smith (Idaho), 16 Pac. 915; Butler v. Mehrling, 15 Ill. 488; Farrah v. East, 5 Ind. App. 238; 31 N. E. 1125; Hartley Bank v. McCorkell, 91 Iowa, 660; 60 N. W. 19; Barton v. Mulvane, 59 Kan. 313; 52 Pac. 883; Werner v. Graley, 54 Kan. 383; 38 Pac. 482; Yandle v. Kingsbury, 17 Kan. 195; 22 Am. St. Rep. 282; Powers v. Florance, 7 La. Ann. 524; Washington Ice Co. v. Webster, 62 Me. 342; Dorsey v. Gassaway, 2 Har. & J. (Md.) 402; Boston Loan Co. v. Myers, 143 Mass. 446; Hutchinson v. Hutchinson, 102 Mich. 635; 61 N. W. 60; Aber v. Bratton, 60 Mich. 357; Nash v. Larson (Minn.), 83 N. W. 451; Qualy v. Johnson (Minn.), 83 N. W. 393; Williams v. Wood, 61 Minn. 194; 63 N. W. 492; Sherman v. Clark, 24 Minn. 37; Reno v. Kingsbury, 39 Mo. App. 240; Chauvrin v. Valiton, 8 Mont. 451; Morgan v. Reynolds, 1 Blake (Mont.), 164; Allen v. Fox, 51 N. Y. 562; 10 Am. St. Rep. 641; Slocum v. Delano, 17 Wkly. Dig. (N. Y.) 207; Scott v. Elliott, 63 N. C. 215; Hill v. Wilson, 8 N. D. 309; 79 N. W. 150; Coffin v. Taylor, 16 Oreg. 375; Cummings v. Gann, 52 Pa. St. 484; Mineralized Rubber Co. v. City of Cleburne, 22 Tex. Civ. App. 621; 56 S. W. 220; Moore v. King, 4 Tex. Civ. App. 397; 33 S. W. 484; Clapp v. Walters, 2 Tex. 130; Farrand & V. Organ Co. v. Church Extension of M. E. Church, 17 Utah, 469; 54 Pac. 818; Zitske v. Goldberg, 38 Wis. 216. But see Twinan v. Swart, 4 Lans. (N. Y.) 263.

[64] Farrah v. East, 5 Ind. App. 238; 31 N. E. 1125; Hutchinson v. Hutchinson, 102 Mich. 635; 61 N. W. 60; Qualy v. Johnson (Minn.), 83 N. W. 353; Allen v. Fox, 51 N. Y. 562; 10 Am. St. Rep. 641. But in an action for the wrongful detention of horses, a wagon and a harness, it is error to instruct the jury that the measure of damages is the value of the hire of such property during the period of detention without reference to the expenses of keeping the property or the fact that it might not constantly be employed, especially where the damages allowed therefor exceed the entire value of the property. Brunell v. Cook, 13 Mont. 497; 34 Pac. 1015.

such an action has been permitted to recover the unusual value of the use of a team and hack on a particular day because of a circus being in town on that day.[65] And again, where hose sold to a city was replevied by the seller, the contract under which it was sold being unenforceable, he was allowed as damages compensation for its use while in the possession of the city.[66] As a general rule in order to authorize a recovery for the value of the use, the plaintiff must be entitled to its use,[67] and should show that he was in a position to use it.[68] So there can be no recovery for the value of the use of property by an officer who held it by virtue of legal process,[69] or by a pledgee of the property.[70] Again, it is decided that such damages are special and must be specially pleaded.[71] And, in the absence of any evidence as to the value of the use of the property in question, it is error to instruct the jury that they may determine such value from their general knowledge with reference to the use of such property.[72]

§ 1225. Depreciation in value.—Upon the question as to depreciation in value of the property, while in defendant's possession, it may be stated generally that the defendant in all cases supposedly holds the property under an honest claim of ownership of or title to the same. Therefore, so holding it, if the property depreciates in value, he should be charged therewith, for he should be presumed to hold the same at his own risk. Again, if the possession of the defendant be in wilful disregard of the rights of the plaintiff, he should also be so responsible. In either case the question as to whether the depreciation was with or without the fault of the defendant should be immaterial. By his possession he has deprived the plaintiff of control over

[65] Hill v. Wilson, 8 N. D. 309; 79 N. W. 150.

[66] Mineralized Rubber Co. v. City of Cleburne, 22 Tex. Civ. App. 621; 56 S. W. 220.

[67] McArthur v. Howett, 72 Ill. 358; Thompson v. Scheid, 39 Minn. 102; Booth v. Ableman, 20 Wis. 602.

[68] Smith v. Stevens, 14 Colo. App. 491; 60 Pac. 580; Barney v. Douglass, 22 Wis. 464.

[69] Booth v. Ableman, 20 Wis. 602. See Clark v. Martin, 120 Mass. 543.

[70] McArthur v. Howett, 72 Ill. 358.

[71] Qualy v. Johnson (Minn.), 83 N. W. 393; Ferguson v. Hogan, 25 Minn. 135. But see Farrand v. Board of Church Extension, 18 Utah, 29; 54 Pac. 818.

[72] Brown v. Morris, 3 Kan. App. 86; 45 Pac. 98.

the property and of the right and power to sell and dispose of the same, and thus perhaps avert any loss or depreciation therein. The same principle would also apply in those cases where the ownership is found in the defendant, and the property has, during the pendency of the action and by virtue of the writ, remained in possession of the plaintiff. In either case, the rightful owner being deprived of the control of the property by the acts of another, the latter should be the one to sustain any loss due to depreciation in value of such property, and not the owner, who, by no act of his own has been deprived of the power to manage and control his property.[73] But where the article replevied is retained by the plaintiff until judgment in the suit, damages for depreciation in value cannot be recovered, as he might at any time have converted it into money.[74]

§ 1226. Where property is changed in form—Labor expended.—The question has arisen in many cases as to the respective rights of the parties where the form of the property has been changed by the act of another. This question is considered from two standpoints, namely, those cases where the change is made in good faith and those where the trespass or

[73] White v. Ross, 5 Stew. & P. (Ala.) 123; Austin v. Terry, 13 Colo. App. 141; Dalby v. Campbell, 26 Ill. App. 502; Yelton v. Slinkard, 85 Ind. 190; Russell v. Smith, 14 Kan. 366; Caldwell v. Fenwick, 2 Dana (Ky.), 333; Gentry v. Hughes, 6 T. B. Mon. (Ky.) 116; Washington Ice Co. v. Webster, 62 Me. 341; Abee v. Bratton, 60 Mich. 357; Mix v. Kepner, 81 Mo. 93; Pope v. Jenkins, 30 Mo. 528; Hinchey v. Kock, 42 Mo. App. 230; Miller v. Bryden, 34 Mo. App. 606; Proctor v. Irwin, 22 Mont. 547; 57 Pac. 183; Suydam v. Jenkins, 3 Sandf. (N. Y.) 614; Young v. Willett, 8 Bosw. (N. Y.) 486; Rowley v. Gibbs, 14 Johns. (N. Y.) 385; Harrison v. Chappell, 84 N. C. 258; Coos Bay R. & E. R. & Nav. Co. v. Siglin, 57 Neb. 413; Findlay v. Knickerbocker Ice Co., 104 Wis. 375; 80 N. W. 436; Wadleigh v. Buckingham, 80 Wis. 230; 49 N. W. 745. See also Rose v. Pearson, 41 Ala. 692. But see Rapid Safety Filter Co. v. Wyckoff, 20 Misc. (N. Y.) 17; 44 N. Y. Supp. 601. In some cases it has been held that there can be no recovery from the plaintiff for depreciation in value in those cases, where the defendant prevails, provided the plaintiff has acted fairly and given the bond required by law he, in such a case, not being a wrongdoer, though acting in a mistaken belief as to his right in the property. Berry v. Hoeffner, 56 Me. 170; Walker v. Osgood, 53 Me. 422.

[74] Gordon v. Jenney, 16 Mass. 465.

other act, whereby the wrongdoer obtained possession of the property, was wilful and malicious. In the consideration of this general question, the question of the identity of the property arises and, in this connection, there has been much confusion as to what constitutes a change of identity and it has been truly said that there is no definite settled rule which controls or can be followed in all cases.[75] So, in determining this question, reference only can be had to the general rules and the particular facts of each case. It may be stated generally that the owner of property may pursue the same so long as it can be identified, unless it is annexed to or made a part of some other thing which is the principal, when the damages recoverable is the original value of the property.[76] But it is an equitable doctrine that where labor has been by mistake and in good faith expended upon another's property, thereby converting it into something substantially different, and the value of the original article is insignificant as compared with the value of the new production, title passes to the person whose labor has increased its value and the original owner may recover the original value.[77] So, where timber to the value of twenty-five dollars was converted in good faith into hoops of the value of seven hundred dollars, the title, in its converted form in the property, was held to pass to the party by whose labor in good faith the change had been wrought.[78] But a person is not entitled to compensation for labor expended by mistake, though in good faith, upon the property of another who appropriates the benefit thereof, when the identity of the original article is not destroyed or its value greatly increased.[79] The object of the law, in question of title to property by succession, is to adjust the redress afforded to one party and the penalty inflicted on the other as near as cir-

[75] Silsbury v. McCoon, 3 N. Y. 379; 53 Am. Dec. 307; 1 Cyc. 223.

[76] Davis v. Easley, 13 Ill. 193.

[77] Isle Royale Min. Co. v. Hertin, 37 Mich. 332; 26 Am. Rep. 520. See also Peters B. & L. Co. v. Lesh, 119 Ind. 98; Sommer v. Adler, 36 App. Div. (N. Y.) 107; 55 N. Y. Supp. 483; Buckley v. Buckley, 12 Nev. 423; Hungerford v. Redford, 29 Wis. 345.

[78] Weatherbee v. Green, 22 Mich. 310; 7 Am. Rep. 653.

[79] Isle Royale Min. Co. v. Hertin, 37 Mich. 332; 26 Am. Rep. 520. So held in this case where cord-wood was cut on the lands of another, hauled to a landing place and piled and was there seized and sold by the original owner.

cumstances will permit to rules of substantial justice.[80] So it is declared, in one case, that in replevin, where a recovery of the value of the property is sought, the court adopts the rule that the usual measure of recovery is the value before the property was improved by defendant's skill and labor and this even in cases where it was taken knowingly and wilfully without color or claim of right; except where such taking was accompanied by special circumstances (as of malice or insult) which would justify exemplary damages.[81] But, as a general rule, a wilful trespasser, who expends his money or labor on the property of another, acquires no rights therein, but the owner may reclaim it so long as its identity is not changed by conversion into some new product.[82] And, if a taking in replevin was with malice or oppression, damages may be punitive and no allowance made for any increased value bestowed by skill and labor on the property.[83] And a purchaser of logs, from a homestead claimant of public lands subsequently adjudged to have no title or right to sell such logs, who purchased with knowledge that the seller's title was in controversy in the courts, is not equitably entitled to repayment from the rightful owner of the sum expended in cutting such logs as a condition to their recovery in replevin.[84]

§ 1227. Special interests.—The prevailing party in an action of replevin, who has only a special or part interest in the property in controversy, is limited as a general rule to a recovery of damages only for the value of such interest.[85] But where it ap-

[80] Weatherbee v. Green, 22 Mich. 310; 7 Am. Rep. 653.

[81] Single v. Schneider, 30 Wis. 570, where logs were cut value of stumpage.

[82] Isle Royale Min. Co. v. Hertin, 37 Mich. 332; 26 Am. Rep. 520. Thus it has been held that the owner of corn which the trespasser has converted into whiskey could reclaim the manfactured article. Silsbury v. McCoon, 3 N. Y. 379.

[83] Heard v. James, 49 Miss. 236.

[84] Cunningham v. Met. Lumber Co., 110 Fed. 332.

[85] Barse Live Stock Conn. Co. v. Adams (I. T.), 48 S. W. 1023; Peck v. Bonebright (Iowa), 106 Iowa, 98; 39 N. W. 213; Shahan v. Smith, 38 Kan. 474; 16 Pac. 749; Weber v. Henry, 16 Mich. 399; Pallen v. Bogy, 78 Mo. App. 88; 2 Mo. App. Rep. 232; Hall v. Bramell, 87 Mo. App. 285; Dilworth v. McKelvy, 30 Mo. 153; Bleiler v. Moore, 88 Wis. 438; 60 N. W. 792. See Holmes v. Langston, 110 Ga. 861; 36 S. E. 251. But see Soule v. White, 14 Me. 436; Dous v. Rush, 28 Barb. (N. Y.) 157; Andrews v. Durant, 18 N. Y. 496.

pears that the prevailing party is responsible to another for the full value of such property, a recovery of such value may be had.[86] And it has been held that, though damages in excess of the special interest be awarded, this will not be a ground for a new trial, unless it also appear that the defendant cannot by a surrender of the property escape payment of the value.[87] The rule as to value of special interest only being recoverable, has been applied in the case of a judgment in favor of an officer from whom goods held by him under an attachment have been replevied,[88] and also in the case of one having only a lien upon the property.[89] But a recovery of the full value of the property has been allowed, as against a stranger, by one holding only a special interest as in the case of a carrier.[90] And where a joint owner of property took the whole property from a bailee to whom it had been delivered by the other joint owner and who was in rightful possession thereof, the bailee was held entitled to recover the whole value of the property.[91] And again the rule, that where the plaintiff in replevin recovers the value, the measure of damages is the interest on such value while the property was detained, applies to property received by the plaintiff in pledge under an express contract to sell the same and account for the proceeds.[92]

§ 1228. Cattle—Increase.—Where cattle have been wrongfully taken or detained, in an action of replevin, there may be a recovery for the increase during the period of such detention. Thus it was so held where a cow was wrongfully detained, and during such period had two calves.[93] And evidence of the increase of cattle for a certain year, as compared with their increase for former years, has been held admissible in a suit to

[86] Madison Nat. Bank v. Farmer, 5 Dak. 282; 40 N. W. 345.

[87] Glascock v. Hays, 4 Dana (Ky.), 58.

[88] Shahan v. Smith, 38 Kan. 474; 16 Pac. 749; Regier v. Shreck, 47 Neb. 667; 66 N. W. 618; Jennings v. Johnson, 17 Ohio, 154; Clark v. Lamoreux (Wis.), 36 N. W. 393.

[89] Pallen v. Bogy, 78 Mo. App. 88; 2 Mo. App. Rep. 232. But see Dous v. Greene, 32 Barb. (N. Y.) 490; Dous v. Rush, 28 Barb. (N. Y.) 157.

[90] Whitney v. Hyde, 91 Mich. 13; 51 N. W. 696. See also Hall v. Southern Pac. R. Co. (Ariz.), 57 Pac. 617.

[91] Russell v. Allen, 13 N. Y. 173.

[92] Johnson v. Bailey, 17 Colo. 59; 28 Pac. 81.

[93] Morris v. Coburn, 71 Tex. 406; 9 S. W. 345.

recover for their wrongful taking and detention for such year, when it is shown that defendant drove the cattle and so managed them as to entail loss.[94]

§ 1229. Crops.—Where crops have been illegally levied on, in an action to recover possession, and have been sold, the date of wrongful taking may be considered as that of the day of sale and the value may be shown and found as of that date.[95] But, in California, where one has recovered possession of lands by ejectment and replevied the crops grown and harvested before the judgment, it has been decided that in an action to recover their value, there may be a recovery of the highest market value within a reasonable time after the property was taken with interest computed from the time such value was estimated.[96]

§ 1230. Machinery—Rental value.—Where, pending litigation, machinery is detained without using it, the measure of damages therefor will be the fair rental value of the same, less any damage which would have resulted from extra wear and tear if it had been used.[97]

§ 1231. Notes.—The measure of damages, in the case of a note, is declared to be the actual value of the same and not its face value or what purports to be due thereon.[98] But in an action of replevin by a corporation by the maker of notes, which have been diverted, by one of its officers, against one who does not occupy the relation of a bona fide holder, their value is limited to the value of the material upon which they are written and a direction to assess damages at the amount apparently due thereon is error.[99]

§ 1232. Stocks and bonds.—In an action of replevin for stocks or bonds there may be a recovery, as damages, in addi-

[94] Proctor v. Irvin, 22 Mont. 547; 57 Pac. 183.

[95] Howard v. Rugland, 35 Minn. 388; 29 N. W. 63.

[96] Page v. Fowler, 39 Cal. 412; 2 Am. Rep. 462; Tully v. Harloe, 35 Cal. 302.

[97] Peerless Mach. Co. v. Gates, 61 Minn. 124; 63 N. W. 260.

[98] Turner v. Retter, 58 Ill. 264.

[99] Davis Sew. Mach. Co. v. Best, 105 N. Y. 59.

tion to the value thereof where they cannot be returned, of such dividends as may have been paid.[100] But, where the legal rate of interest in the state exceeds the rate payable upon the particular stocks or bonds in question, it has been held proper to allow the legal rate.[1]

§ 1233. Replevin by seller—Conditional sale.—Where property has been sold under a conditional sale in an action of replevin therefor, by the seller, the measure of damages where recovery cannot be had, is the contract price for the property with interest, less such payments as may have been made thereon, under a statute which authorizes a recovery of the value at the time of the unlawful taking or detention and interest.[2]

§ 1234. By vendor—Lease with privilege of purchase.—In a replevin suit by a vendor, who has given a lease of the property with a privilege of purchasing the same, the measure of damages will, it has been decided, be the actual value of the property at the time the vendee's possession becomes wrongful and not the valuation fixed in the lease, especially where the lease was made several years before.[3]

§ 1235. Mortgagee and third party.—In an action of replevin by the mortgagee of personal property against one who has taken the same subject to such mortgage, if the verdict be for the defendant, the measure of damages will be the value of the property less the amount due on the mortgage.[4]

§ 1236. Replevin by tenant of goods distrained for rent—Double damages.—Where a landlord distrains the goods of a tenant for rent, and under a statute he may recover double damages in case they are replevied by the latter, and the rent is found to be justly due and in arrear, such damages will not be

[100] Bercich v. Marye, 9 Nev. 312; O'Meara v. North. Amer. Min. Co., 2 Nev. 112.

[1] Gavin v. De Miranda, 140 N. Y. 474; 35 N. E. 626.

[2] Hall v. Tillman, 110 N. C. 220; 14 S. E. 745.

[3] Maguire v. Dutton, 54 N. J. L. 597; 25 Atl. 254.

[4] Russell v. Butterfield, 21 Wend. (N. Y.) 300.

allowed, where a verdict is obtained in favor of the landlord for only a part of the sum claimed to be due.[5]

§ 1237. Evidence—Value—Sale price.—Evidence of the price received for property, upon an execution sale, is admissible in action of replevin upon the question of value.[6] And where property has been wrongfully seized and is the subject of replevin, in case it has been sold by the defendants, the value thereof may in some cases be fixed at the amount received upon such sale, as in the case of a sale by the sheriff where it was fair, on due notice, was well attended, and there was competitive bidding.[7]

§ 1238. Evidence—Opinions as to value.—The opinions of the plaintiff and defendant, in replevin, may be admitted under certain circumstances as to the value of the property. So, in an action for the recovery of a horse, the opinion of the plaintiff as to its value is admissible, where it appears from his testimony that he has some knowledge on this subject.[8] And likewise the defendant, in replevin, is competent to give his opinion as to the value of one of the horses replevied, where it is shown that he purchased the horse and was engaged in a business in which he made use of such horses.[9] But it has been held that the opinion of the plaintiff in replevin, as to the amount of his damage, by reason of the detention of the property, is not admissible where he is not interrogated as to the facts upon which he bases it.[10]

§ 1239. Evidence—Ownership—Variance.—If the title to the property is sufficiently proved to support a recovery against the defendant, evidence of a qualified ownership is not material variance from the averment of absolute ownership.[11]

[5] Terrel v. Ligor, 1 Miss. (Walk.) 170.

[6] Jacob v. Watkins, 3 App. Div. (N. Y.) 422; 38 N. Y. Supp. 763.

[7] Sather Bkg. Co. v. Hartwig, 23 Misc. (N. Y.) 89; 51 N. Y. Supp. 677. See also Hume Bank v. Hartsock, 56 Mo. App. 291.

[8] Fishbach v. Steinway R. Co., 11 App. Div. (N. Y.) 152; 42 N. Y. Supp. 883.

[9] Mason v. Patrick, 100 Mich. 577; 59 N. W. 239.

[10] Cothran v. Knight, 45 S. C. 1; 22 S. E. 596.

[11] Schmidt v. First Nat. Bank, 10 Colo. App. 267; 50 Pac. 733.

§ 1240. Mitigation of damages—Set-off.—In replevin, for property levied on by a sheriff, if a judgment is given that it be returned to such officer the replevin plaintiff may, on a retrial, for the purpose of reducing the damages and value of the officer's possession, show that the judgment upon which the execution was issued has been reversed.[12] Again, though the defendant in replevin, for the purpose of defeating the action in toto, asserts an absolute title and repudiates the contract of purchase on the ground that it is not binding because of failure to record the same, he may, nevertheless, in mitigation of damages, prove a qualified title under such contract under which part of the purchase price has been paid.[13] And, in an action of replevin to enforce a chattel mortgage of a machine sold by the plaintiff to defendant, it has been decided in Kansas, that failure of the machine to do the work guaranteed and damage sustained by the plaintiff from delay in delivering the same, may be set up in defense to such action, for the purpose of lessening the damages, and an allowance therefor as a set-off to the damages recoverable by the plaintiff will operate as a bar to the recovery of subsequent damages therefor.[14]

§ 1241. Right of defendant to assessment of damages where no service on him.—In Michigan, it has been decided that where in a replevin suit the property is seized but due service is not made on the defendant and the case is dismissed by the justice, a return of the property may be waived by the defendant who is entitled to have an assessment of his damages which the justice may be compelled by mandamus to make.[15]

§ 1242. Where property found in each party.—In replevin, issue being joined upon the plaintiff's property in chattels, if the finding be of a part interest therein in each party, each will be entitled to damages and costs.[16]

[12] Shreck v. Gilbert, 52 Neb. 813; 73 N. W. 276.

[13] Collins v. Bellefonte C. R. Co., 171 Pa. 243; 33 Atl. 331; 37 W. N. C. 233.

[14] Clement v. Field, 147 U. S. 467; 37 L. Ed. 244; 13 Sup. Ct. Rep. 358.

[15] Johnson v. Dick, 69 Mich. 108; 36 N. W. 738; Humphrey v. Bayn, 45 Mich. 565; 8 N. W. 556; People v. Osborn, 38 Mich. 313; Forbes v. Judge, 23 Mich. 497; People v. Tripp, 15 Mich. 517.

[16] Powell v. Hinsdale, 5 Mass. 343.

CHAPTER L.

PATENTS, COPYRIGHTS AND TRADE-MARKS.

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§ 1243. Remedies for infringement of patent—Distinction in.—The owner of a patent has two remedies in case of an infringement thereof. He may proceed in an action at law to recover damages from the wrongdoer or he may proceed in

equity, which is generally by a suit for an injunction, in which he is, since the act of July 8, 1870,[1] also permitted to recover damages for the wrongful act. Prior to this act, however, his recovery in equity was limited to the gains or profits of defendant.[2] As to the distinction between these remedies it is said: "There is a difference between the measure of recovery in equity and that applicable in an action at law. In equity, the complainant is entitled to recover such gains and profits as have been made by the infringer from unlawful use of the invention, and, since the Act of July 8, 1870, in cases where the injury sustained by the infringement is plainly greater than the aggregate of what was made by the defendant, the complainant is entitled to recover the damages he has sustained in addition to the profits received. At law the plaintiff is entitled to recover as damages compensation for the pecuniary loss he has suffered from the infringement, without regard to the question whether the defendant has gained or lost by his unlawful acts, the measure of recovery in such cases being not what the defendant has gained, but what the plaintiff has lost."[3]

§ 1244. Same subject—Birdsall v. Coolidge.—"Controversies and cases arising under the patent laws are originally cognizable, as well as in equity as at law, by the circuit courts, or by any district court having circuit powers. Prior to the

[1] This statute provides as follows: The several courts vested with jurisdiction of cases arising under the patent laws shall have power to grant injunctions according to the course and principles of courts of equity, to prevent the violation of any right secured by patent on such terms as the court may deem reasonable; and upon decree being rendered in any such case for infringement, the complainant shall be entitled to recover, in addition to the profits to be accounted for by the defendant, the damages the complainant has sustained thereby; and the court shall assess the same or cause the same to be assessed under its direction. And the court shall have the same powers to increase such damages, in its discretion, as is given to increase the damages found by verdicts in actions in the nature of actions of trespass upon the case. U. S. Rev. Stat. sec. 4921.

[2] For a general consideration of this question and history of the different remedies conferred upon the owner of a patent by the various acts of Congress and the construction of such acts, see Root v. Lake Shore & Mich. S. R. Co., 105 U. S. 189; 26 L. Ed. 975.

[3] W. Coupe v. Royer, 155 U. S. 582; 39 L. Ed. 269, per Mr. Justice Shiras.

passage of the act of the 8th of July, 1870, two remedies were open to the owner of a patent whose rights had been infringed, and he had his election between the two; he might proceed in equity and recover the gains and profits which the infringer had made by the unlawful use of his invention, the infringer in such suit being regarded as the trustee of the owner of the patent as respects such gains and profits; or the owner of patent might sue at law, in which case he would be entitled to recover, as damages, compensation for the pecuniary injury he suffered by the infringement, without regard to the question whether the defendant had gained or lost by his unlawful acts, the measure of damages in such case being not what the defendants had gained, but what the plaintiff had lost."[4] "Where the suit is at law, the measure of damages remains unchanged to the present time, the rule still being, that the verdict of the jury must be for the actual damages sustained by the plaintiff, subject to the right of the court to enter judgment thereon for sum above the verdict, not exceeding three times that amount, together with costs."[5] "Damages of a compensatory character may also be allowed to the complainant suing in equity, in certain cases, where the gains and profits made by the respondent are clearly not sufficient to compensate the complainant for the injury sustained by the unlawful violation of the exclusive right secured to him by the patent. Gains and profits are still the proper measure of damages in equity suits, except in cases where the injury sustained by the infringement is plainly greater than the aggregate of what was made by the respondent; in which event the provision is, that the complainant shall be entitled to recover, in addition to the profits to be accounted for by the respndent, the damages he has sustained thereby."[6]

§ 1245. Rule in equity—Principle on which founded.—The principle upon which the equity rule, which permits of a recovery by the patentee of the gains and profits, is founded, is that the infringer is considered as a trustee of the profits derived

[4] Citing Curtis, Pat. 4th ed. 461; 5 Stat. at L. 123.

[5] Citing 16 Stat. at L. 207; Curtis, Pat. 4th ed. 461; 5 Stat. at L. 123.

[6] Birdsall v. Coolidge, 93 U. S. 64; 23 L. Ed. 804, per Mr. Justice Clifford.

from his wrongful act and that a court of equity, which has jurisdiction over trusts and trustees, will, in the exercise thereof, compel him to account as trustee to the patentee where other relief is sought.[7]

§ 1246. Bill in equity for naked account of profits and damages not maintainable.—Though equity may decree an accounting of profits by the infringer of a patent and has also power to assess damages or cause the same to be assessed, yet such relief is incidental to some other equity, which secures to the patentee his standing in court, and a bill in equity for a naked account of profits and damages cannot be sustained. This question arose in a case before the United States supreme court, and the following extract from the opinion therein given is pertinent in this connection: "The distinct ground upon which the opposite view is presented to us in argument is, that the infringer of a patent right is, by construction of law, a trustee of the profits derived from his wrong, for the patentee, and that the court of equity, in the exercise of its acknowledged jurisdiction over trusts and trustees, will require him to account as trustee, without reference to any other relief. And in support of this contention we are referred to passages in the judgments of this court. . . . But the inference sought to be drawn from the expressions referred to is not warranted. It is true that it is declared in those cases that, in suits in equity for relief against infringements of patents, the patentee, succeeding in establishing his right, is entitled to an account of the profits realized by the infringer, and that the rule for ascertaining the amount of such profits is that of treating the infringer as though he were a trustee for the patentee, in respect to profits. But it is nowhere said that the patentee's right to account is based upon the idea that there is a fiduciary relation created between him and the wrongdoer, by the fact of infringement, thus conferring jurisdiction upon a court of equity to administer the trust and compel the trustee to account. That would be a reductio ad absurdumn, and if accepted would extend the jurisdiction of equity to every case of tort, where the wrongdoer had realized

[7] Root v. Lake Shore & M. S. R. Co., 105 U. S. 244; 26 L. Ed. 984, and cases therein cited.

a pecuniary profit from the wrong." "Our conclusion is, that a bill in equity for a naked account of profits and damages against the infringer of a patent cannot be sustained; that such relief ordinarily is incidental to some other equity, the right to enforce which secures to the patentee his standing in court; that the most general ground for equitable interposition is to insure to the patentee the enjoyment of his specific right by injunction against a continuance of the infringement; but grounds of equitable relief may arise, other than by way of injunction, as where the title of the complainant is equitable merely, or equitable interposition is necessary on account of the impediments which prevent a resort to remedies purely legal; and such equity may arise out of and inure in the nature of the account itself, springing from special and peculiar circumstances which disable the patentee from a recovery at law altogether, and render his remedy in a legal tribunal difficult, inadequate, and incomplete; and as such cases cannot be defined more exactly, each must rest upon its own particular circumstances, as furnishing a clear and satisfactory ground of exception from the general rule."[8]

§ 1247. Measure of damages at law—Generally.—The measure of damages in action at law for the infringement of a patent is a compensation for the actual loss which has been sustained as a result thereof by the owner, being generally estimated on the actual loss or damage resulting to the latter and not on what may have been the profit to the wrongdoer or whether he has gained or lost by his unlawful acts.[9] And it is declared that "actual damages must be actually proved, and cannot be assumed as a legal inference from any facts which amount not to

[8] Root v. L. S. & M. Southern R. Co., 105 U. S. 244; 26 L. Ed. 984, per Mr. Justice Matthews.

[9] Coupe v. Royer, 155 U. S. 565; 39 L. Ed. 263; 15 Sup. Ct. Rep. 199, rev'g Royer v. Coupe, 29 Fed. 358; Tilghman v. Proctor, 125 U. S. 137; 31 L. Ed. 664; 8 Sup. Ct. Rep. 895; Seymor v. McCormick, 16 How. 480; Birdsall v. Coolidge, 93 U. S. 64; 23 L. Ed. 802; Cassidy v. Hunt, 75 Fed. 1012; Lee v. Pillsbury, 49 Fed. 747; Royer v. Schultz Belting Co., 45 Fed. 51; Willimantic Thread Co. v. Clark, 27 Fed. 865; Tatham v. Leroy, 2 Blatchf. (U. S.) 474; Fed. Cas. No. 13,760; Hall v. Wiles, Blatchf. (U. S.) 194; Fed. Cas. No. 5954; Buck v. Hermance, 1 Blatchf. (U. S.) 399; Fed. Cas. No. 2082; Page v. Ferry, 1 Fish. Pat. Cas. 298; Fed. Cas. No. 10,662.

actual proof of the fact. What a patentee 'would have made, if the infringer had not interfered with his rights,' is a question of fact and not a judgment, 'of law.' The question is not what speculatively he may have lost, but what actually he did lose." [10]

§ 1248. Basis of estimating damages.—In estimating the damages to which the owner of a patent may be entitled, we must first determine the manner in which he has exercised his rights thereunder. He may either retain the exclusive rights to the sale and manufacture of such patent or, as is frequently done, he may, in consideration of a certain royalty or license fee, confer upon others the right to manufacture and sell or to use such patent. In the former case, his loss of sales or the profits will be the criterion of damages, while in the latter case the license fee or royalty will be the basis.[11] So it has been declared that "it must be apparent to the most superficial observer that an immense variety of patents is issued every day, but there cannot in the nature of things be any one rule of damages which will equally apply to all cases. The mode of ascertaining actual damages must necessarily depend on the peculiar nature of the monopoly granted." [12]

§ 1249. Doubt as to sufficiency of evidence—Infringement wanton.—Any doubt as to the sufficiency of the evidence to warrant a finding of the amount of the damages should, it has been determined, be resolved against the one infringing, where it appears that such act on his part was wanton.[13]

§ 1250. License fees.—A license fee, with interest, may be the criterion in assessing damages for the infringement of a patent as it will be considered, where there has been a sufficient

[10] Seymour v. McCormick, 16 How. (U. S.) 489; 14 L. Ed. 1028, per Mr. Justice Grier.

[11] See secs. 1250, 1251, 1255, 1256 in this chapter where there are discussed.

[12] Seymour v. McCormick, 16 How. (U. S.) 489, 14 L. Ed. 1028, per Mr. Justice Grier. See also Regina Music Box Co. v. Otto & Sons, 114 Fed. 505.

[13] Regina Music Box Co. v. Otto & Sons, 114 Fed. 505.

number of sales on payment of such fees, that the owner has himself established this as his actual damages. License fees, however, to be a sufficient basis for estimating the damages must be such as to show an established charge or royalty for the use of the patent which will show a market value.[15] And they must also be uniform and must be paid by such a number of persons as to indicate a general acquiescence in its reasonableness.[15] Thus it has been declared that "it is undoubtedly true that where there has been such a number of sales by a patentee of licenses to make, use and sell as patents, as to establish a regular price for the license, that price may be taken as a measure of damages against infringers. . . . Sales of licenses made at periods years apart, will not establish any rule on the subject and determine the value of the patent; like sales of ordinary goods, they must be common, that is, of frequent occurrence, to establish such market prices for the article that it may be assumed to express, with reference to all similar articles, their salable value at the place designated. In order that a royalty may be accepted as a measure of damages against an infringer, who is a stranger to the license establishing it, it must be paid by such a number of persons as to indicate a general acquiescence in its reasonableness by those who have oc-

[14] Rude v. Westcott, 130 U. S. 152; 32 L. Ed. 888; Tighlman v. Proctor, 125 U. S. 137; 31 L. Ed. 664; Clark v. Wooster, 119 U. S. 322; 30 L. Ed. 392; 7 S. Ct. 217; Excelsior Mfg. Co. v. Bussey, 110 U. S. 131; 28 L. Ed. 95; Root v. Lake Shore & M. S. R. Co., 105 U. S. 189; 26 L. Ed. 975; Birdsall v. Coolidge, 93 U. S. 64; 23 L. Ed. 802; Burdell v. Denig, 92 U. S. 716; Packet Co. v. Sickles, 19 Wall. (U. S.) 617; 22 L. Ed. 204; Phillip v. Nock, 17 Wall. (U. S.) 460; 21 L. Ed. 679; New York City v. Ransom, 2 How. (U. S.) 487; 16 L. Ed. 515; Livingston v. Jones, 3 Wall. Jr. (U. S.) 330; Fed. Cas. No. 8414; McCormick v. Seymour, 3 Blatchf. (U. S.) 209; Fed. Cas. No. 8727; Graham v. Plano Mfg. Co., 35 Fed. 597; May v. Fond du Lac Co., 27 Fed. 691; Stutz v. Armstrong, 25 Fed. 147; Graham v. Geneva Lake Crawford Co., 24 Fed. 642; Wooster v. Simonson, 20 Fed. 316; Westcott v. Rude, 19 Fed. 830; Nat. Car Brake Shoe Co. v. Terre Haute Car & Mfg. Co., 19 Fed. 514; Enugh v. Balt. & O. R. R. Co., 6 Fed. 283; Emerson v. Simm, 6 Fish. Pat. Cas. 281; Fed. Cas. No. 443.

[15] Rude v. Westcott, 130 U. S. 152; 32 L. Ed. 888; 9 Sup. Ct. Rep. 463; Graham v. Plano Mfg. Co., 35 Fed. 597; Judson v. Bradford, 3 Ban. & A. 549; Adams v. Belaine Stamping Co., 28 Fed. 360.

[16] Rude v. Westcott, 130 U. S. 152; 32 L. Ed. 888; 9 S. Ct. 463; Hammacher v. Wilson, 32 Fed. 796.

casion to use the invention; and it must be uniform at the places where the license is issued."[17] And it has also been declared that in order to be competent evidence of value, the prices agreed upon must have been fixed with regard to future use when, there being no liability between the parties, they are presumed on both sides to have acted voluntarily and therefore to have made up their minds deliberately as to what was a fair price.[18] Again, a license fee or royalty is not, in all cases, an absolute test of the measure of damages, but it is to be considered in connection with other qualifying circumstances.[19] So a royalty for the whole monopoly of a patented article is not the test for a few sales in a particular territory.[20] And if a royalty or license fee is generally uniform, it has been decided that a few instances of a less rate, given under special circumstances, will not affect its consideration.[21]

§ 1251. What amounts to a license fee.—An agreement to secure the manufacture of a machine covered by a patent and its introduction into public use and providing for a royalty, will not be unqualifiedly construed as fixing a license fee.[22] And a license charged in one case only, or that charged in two or three cases, may not be sufficient to establish a customary fee.[23] Nor are payments made in settlements of infringements already perpetrated competent evidence.[24] But where a fee is established at a certain sum with a condition, however, that it shall be reduced if paid promptly, it has been held that

[17] Rude v. Westcott, 130 U. S. 152; 32 L. Ed. 894, per Mr. Justice Field.

[18] Nat. Car Brake Shoe Co. v. Terre Haute Car & M. Co., 19 Fed. 514, per Woods, J.

[19] Keller v. Stolzenbaugh, 43 Fed. 378; Wooster v. Thornton, 26 Fed. 274, appeal dismissed 136 U. S. 651; 34 L. Ed. 550; 10 S. Ct. 1074.

[20] Colgate v. Western Elec. Mfg. Co., 28 Fed. 146.

[21] International Tooth & Crown Co. v. Hank's Dental Assn., 111 Fed. 917; Asmus v. Freeman, 34 Fed. 902. But see Bates v. St. Johnsbury & I. C. R. Co., 32 Fed. 628.

[22] Graham v. Geneva Lake Crawford Mfg. Co., 24 Fed. 642.

[23] Westcott v. Rude, 19 Fed. 830; Houston E. & W. T. R. Co. v. Stern, 74 Fed. 636; 20 C. C. A. 568; 41 U. S. App. 309.

[24] Nat. Car Brake Shoe Co. v. Terre Haute Car & M. Co., 19 Fed. 514; United Nickel Co. v. Cent. Pac. R. Co., 36 Fed. 186; Westcott v. Rude, 19 Fed. 830. See Gottfried v. Crescent Brew. Co., 22 Fed. 433.

it will be construed as establishing a royalty at the reduced amount.[25]

§ 1252. Where license canceled or expired.—Where in an action in equity it appears that a license was given to the defendant to manufacture and sell the goods at a certain royalty, but that such license was subsequently canceled, the damages should be estimated on the profits made by defendant and not on the basis of the license fee.[26] Though it has been decided, in one case, that where the license has expired but defendant has continued the use of a patented machine, the measure of damages is ordinarily what he would have been willing to pay as a license fee for such use.[27]

§ 1253. Royalty fixed by prior decision—Effect of—Interest.—A prior decision fixing the damages for infringements of machines at a certain price per annum for each machine, where not made on the basis of a customary charge but rather as most nearly measuring the compensation to be given in the particular case, does not establish such a customary charge or royalty as will entitle the owner of the patent, upon his recovery of similar damages in a subsequent suit for another infringement, to recover interest on such damages from the end of each year for infringements of that year.[28]

§ 1254. Where no licenses issued.—The measure of damages to which an owner of a patent is entitled, being the actual loss which he has sustained, it follows that where no licenses for its manufacture or sale are granted, but the owner of the patent supplies the demand himself, thus exercising his exclusive right to keep his patent a monopoly, the "difference between his pecuniary condition after the infringement and what his condition would have been if the infringement had not occurred is to be measured, so far as his own sales are concerned, by the difference between the money he would have

[25] Graham v. Geneva Lake Crawford Mfg. Co., 24 Fed. 642.

[26] Wales v. Waterbury Mfg. Co., 87 Fed. 920. See also Bussey v. Excelsior Mfg. Co., 1 Fed. 640.

[27] Porter Needle Co. v. National Needle Co., 22 Fed. 829.

[28] Graham v. Plano Mfg. Co., 35 Fed. 597.

realized from such sales if the infringement had not interfered with such monopoly and the money he did realize from such sales;" and "if such difference can be ascertained by proper and satisfactory evidence, it is a proper measure of damages."[29] So for this purpose evidence is admissible of the profits usually made by the plaintiff on his patented device and of the number of those made and sold by defendant which infringe thereon, and damages may be awarded on the basis of the usual profit on the number sold by defendant.[30] This mode is founded on the presumption that if the defendant had not been wrongfully concerned in the manufacture of such device those persons, who procured them from him, would have applied to the patentee or assignee for them.[31] But such presumption does not arise from the mere fact that sales were made by the defendant, in the absence of other proof, for damages must be proved, and this fact, of itself, is not sufficient.[32]

§ 1255. Same subject—Profits of defendant.—Though it may be stated as a general rule that profits of defendant are not recoverable in actions at law, the measure of damages being confined to the actual damages sustained by plaintiff, yet, as an aid in determining what such damages are, evidence may be admitted of what defendant's profits have been as a result of the infringement, for with such evidence the jury may be better qualified to make a proper estimate.[33] The defendant's profits, however, can never of themselves be made the basis of plaintiff's damages, but are simply to be used in connection with other evidence as an aid in determining the amount to be

[29] Yale Lock Mfg. Co. v. Sargent, 117 U. S. 554; 29 L. Ed. 960, per Mr. Justice Blatchford. See also Covert v. Sargent, 38 Fed. 237; Hall v. Stern, 20 Fed. 788; Putnam v. Lomax, 9 Fed. 448; Buck v. Hermance, Fed. Cas. No. 2082; 1 Blatchf. (U. S.) 398; 1 Fish. Pat. Rep. 251.

[30] Buck v. Hermance, Fed. Cas. No. 2082; 1 Blatchf. 398; 1 Fish. Pat. Rep. 251; Pitts v. Hall, Fed. Cas. No. 11,192; 2 Blatchf. 229; 1 Fish. Pat. Rep. 441.

[31] Pitts v. Hall, Fed. Cas. No. 11,192; 2 Blatchf. (U. S.) 229; 1 Fish. Pat. Rep. 441.

[32] Bell v. United States Stamping Co., 32 Fed. 549, 551, citing Seymour v. McCormick, 16 How. (U. S.) 480; New York v. Ransom, 23 How. (U. S.) 487; Blake v. Robertson, 94 U. S. 728; Dobson v. Hartford Carpet Co., 114 U. S. 439; 5 Sup. Ct. 945; Dobson v. Dornan, 118 U. S. 10; 6 Sup. Ct. 946.

[33] Cassidy v. Hunt, 75 Fed. 1012.

awarded. So it is said in one decision: "In an action at law for infringement, it is true that evidence may be given of profits made by the defendant by the use of the patented device, but such proof is merely a means to an end. Profits eo nomine are not recoverable in such action, and such proof is of no avail in estimating the damages unless further evidence is produced from which the court or jury can legitimately infer that but for the infringement the profits realized by the infringer, or some definite portion thereof, would have been realized by the patentee. In some instances the inference is readily drawn, especially in those cases where both parties are shown to have had equal facilities for manufacture, and the patented device is in itself a complete machine or compound in all respects new, and the inventor has elected to realize on his invention by manufacturing and selling the patented machine or article, but in most other cases proof that a defendant has made large profits furnishes in itself no basis for a correct estimate of the injury sustained by the patentee. It does not follow that what the infringer has made the patentee as a proximate result of the infringement has lost; and there is no presumption either of law or fact that the actual damage done to the patentee is commensurate with the gains of the infringer."[34]

§ 1256. Profits recoverable though license fee shown.—Under the rule in equity that a plaintiff, where he shows an infringement of his patent rights by a wrongful use of such patent, may recover the profits made by the defendant he may, though having established license fees for the use of his patent, recover any gains or profits accruing to the defendant in excess of such fees.[35]

[34] Royer v. Schultz Belting Co., 45 Fed. 52, 53, per Thayer, J., citing Seymour v. McCormick, 16 How. (U. S.) 480; Dobson v. Carpet Co., 114 U. S. 439; 5 Sup. Ct. 945; Dobson v. Dornan, 118 U. S. 10; 6 Sup. Ct. 946; Buerk v. Imhaeuser, 2 Ban. & A. 452; Bell v. Stamping Co., 32 Fed. 549; Roemer v. Simon, 31 Fed. 41; Rob. Pat. sec. 1062.

[35] Tilghman v. Proctor, 125 U. S. 136; 31 L. Ed. 664; 8 S. Ct. 894. See also Coupe v. Royer, 155 U. S. 582; 39 L. Ed. 269; Birdsall v. Coolidge, 93 U. S. 64; Royer v. Schultz Belting Co., 45 Fed. 51; Simpson v. Davis, 22 Fed. 444; Child v. Boston & Fairhaven Iron Works, 19 Fed. 258; Bancroft v. Acton, Fed. Cas. No. 833; Carew v. Boston Elastic

§ 1257. Utility as basis—Reasonable royalty.—In those cases where no established patent or license fee is shown, general evidence must be resorted to in order to get at a fair measure

Fabric Co., Fed. Cas. No. 2397; Goodyear Dental V. Co. v. Van Antwert, Fed. Cas. No. 5600; Wooster v. Taylor, 14 Blatchf. (U. S.) 404. In this connection the following quotation is of value: "The principal question of law now presented is as to the general rule that should govern the amount to be recovered. The defendants contend that the plaintiff, having established license fees for use of his patents, is not entitled to any gains and profits accruing to the defendants, in excess of those fees. The plaintiff contends that, as the profits to be accounted for exceed the damages found by the master, he is entitled to have a decree for profits. In an action at law for an infringement of patent, the plaintiff can recover a verdict for only the actual damages which he has sustained; and the amount of such royalty or license fees as he has been accustomed to receive from third persons for the use of the invention, with interest thereon from the time when they should have been paid by the defendants, is generally, though not always, taken as the measure of his damages; or the court may, whenever the circumstances of the case appear to require it, inflict vindictive or punitive damages, by rendering judgment for not more than thrice the amount of the verdict." Citing acts of July 4, 1836, chap. 357, sec. 14; 5 Stat. at L. 123; July 8, 1870, chap. 230, sec. 59; 16 Stat. L. 207; Rev. Stat. sec. 4919; Seymour v. McCormick, 16 How. (U. S.) 480, 489 (14 L. Ed. 1024, 1028); N. Y. v. Ransom, 23 How. (U. S.) 487 (17 L. Ed. 515); Suffolk Co. v. Hayden, 3 Wall. (U. S.) 315 (18 L. Ed. 76); Philip v. Nock, 17 Wall. (U. S.) 460 (21 L. Ed. 679); Washington, A. & G. Packet Co. v. Sickels, 19 Wall. (U. S.) 611, 617 (21 L. Ed. 203, 204); Burdell v. Denig, 92 U. S. 716 (23, 764). "Upon a bill in equity by the owner against infringers of a patent, the plaintiff is entitled to recover the amount of gains and profits that the defendants have made by the use of his invention. This rule was established by a series of decisions under Patent Act of 1836, which simply conferred upon the courts of the United States general equity jurisdiction, with the power to grant injunctions, in cases arising under the patent laws." Citing Act of July 4, 1836, chap. 357, sec. 17; 5 Stat. L. 124; Livingston v. Woodworth, 15 How. (U. S.) 546 (14 L. Ed. 809); Dean v. Mason, 20 How. (U. S.) 198 (15 L. Ed. 876); Rubber Co. v. Goodyear, 9 Wall. (U. S.) 788 (19 L. Ed. 556); Mowry v. Whitney, 14 Wall. (U. S.) 620 (20 L. Ed. 860); Littlefield v. Perry, 21 Wall. (U. S.) 205, 229 (22 L. Ed. 577, 581); Mason v. Graham, 23 Wall. (U. S.) 261 (23 L. Ed. 86); Tremolo Patent, 23 Wall. (U. S.) 518 (23 L. Ed. 97); Cawood Patent, 94 U. S. 695 (24 L. Ed. 238); Mevs v. Conover, October Term, 1876, 11 Pat. Off. Gaz. 1111*; Elizabeth v. Pavement Co., 97 U. S. 126 (24 L. Ed. 1000); Root v. Lake Shore & M. S. R. Co., 105 U. S. 189 (26 L. Ed. 975). "The reasons which have led to the adoption of this rule are that it comes nearer than any other to doing complete justice between the parties; and that in equity the profits made by the in-

of damages, or even an approximation thereto, and for this purpose, evidence is appropriate and pertinent as to the utility and advantage of the invention over the old modes or devices that

fringer of a patent belonging to the patentee and not to the infringer; and that it is inconsistent with the ordinary principles and practice of courts of chancery, either, on the one hand, to permit the wrongdoer to profit by his own wrong, or, on the other hand, to make no allowance for the cost and expense of conducting his business, or undertake to punish him by obliging him to pay more than a fair compensation to the persons wronged. The infringer is liable for actual not for possible gains. The profits, therefore, which he must account for, are not those which he might reasonably have made, but those which he did make, by the use of the plaintiff's invention; or in other words, the fruits of the advantage which he derived from the use of that invention, over what he would have had in using other means then open to the public and adequate to enable him to obtain an equally beneficial result. If there was no such advantage in his use of the plaintiff's invention, there can be no decree of profits, and the plaintiff's only remedy is by an action at law for damages. "The general rule is sometimes said to be based on the theory that the infringer is converted into a trustee for the owner of the patent, as regards the profits made by the use of his invention, but as has been recently declared by this court, upon an elaborate review of the cases in this country and in England, it is more strictly accurate to say that the court of equity, which has acquired upon some equitable ground, jurisdiction of suit for the infringement of a patent, will not send the plaintiff to a court of law to recover damages, but will itself administer full relief, by awarding, as an equivalent or substitute for legal damages, compensation computed and measured by the same rule that courts of equity apply to the case of a trustee who has wrongfully used the trust property for his own advantage." Citing Root v. Railway Co., 105 U. S. 189, 215 (26 L. Ed. 975, 984). "The rule of equity of requiring the infringer to account for the gains and profits which he made in the use of a patented invention, instead of limiting the recovery to the amount of the royalties paid to the patentee by a third person, has been constantly upheld, under the provision of the Patent Act of 1870, embodied in the Revised Statutes, which, beside reenacting the grant of general equity jurisdiction in patent cases, further enacts that, 'upon decree being rendered in any such case for infringements, the complainant shall be entitled to recover, in addition to the profits to be accounted for by defendant, the damages the defendant has sustained thereby, and the court shall assess the same case or cause the same to be assessed under its direction, and the court shall have the same powers to increase the same in its discretion that were given by this act to increase the damages found by the verdicts in actions upon the case,' and this expressly confirms the defendant's liability to account for profits, as well as authorize the court suing in equity to award and to triple any

have been used for working out similar results.[36] In such a case "with a knowledge of these benefits to the persons who have used the invention and the extent of the use by the infringer, a jury will be in possession of material and controlling facts which may enable them in the exercise of a sound judgment to ascertain the damages, or in other words the loss to the patentee or owner by the piracy, instead of the purchase of the use of the invention."[37] So it was held proper to charge the jury that "if you find in favor of the plaintiffs you should consider the utility and advantage to the defendant of the use of the patented device as compared to any other means of obtaining similar results which were open to the defendant to use, and you may consider the cost of using one as compared with the cost and savings to the defendant of using the other, and from these data, if proven to you, you should ascertain in the exercise of a sound judgment what would be a fair compensation to the plaintiffs for the damage which they have sustained by reason of the defendant having infringed instead of having purchased the right to use the invention."[38] Where, however, it appears that the right to use the patent in question has never been sold to anyone and that it has never been used except by the inventor or owner, it is decided in a late case that it is error to leave it to the jury to decide what would be a reasonable royalty, and that only nominal damages are recoverable,

damages that the plaintiff has sustained in the case of the defendant's profits." Tilghman v. Proctor, 125 U. S. 136; 31 L. Ed. 666, per Mr. Justice Gray, citing Act of July 8, 1870, ch. 230, sec. 55; 16 Stat. at L. 206; Rev. Stat. sec. 4921; Birdsall v. Coolidge, 93 U. S. 64, 69 (23 L. Ed. 802, 804); Marsh v. Seymour, 97 U. S. 348 (24 L. Ed. 963); Root v. R. Co. supra; Goulds Mfg. Co. v. Cowing, 105 U. S. 253 (26 L. Ed. 987); Garretson v. Clark, 111 U. S. 120 (28 L. Ed. 371); Black v. Thorn, 111 U. S. 122 (28 L. Ed. 372); Birdsall v. Shaliol, 112 U. S. 485, 488 (28 L. Ed. 768, 769); Thomson v. Wooster, 114 U. S. 104 (29 L. Ed. 105).

[36] Suffolk Mfg. Co. v. Hayden, 3 Wall. (U. S.) 315; 18 L. Ed. 76; Sessions v. Romadka, 145 U. S. 29; 12 Sup. Ct. 799; Packet Co. v. Sickles, 19 Wall. (U. S.) 617; Cassidy v. Hunt, 75 Fed. 1012; Hunt Bros. Fruit P. Co. v. Cassidy, 64 Fed. 585; 29 U. S. App. 116; 12 C. C. A. 316; Brickill v. City of Baltimore, 60 Fed. 98; 8 C. C. A. 500; Lee v. Pillsbury, 49 Fed. 747.

[37] Suffolk Mfg. Co. v. Hayden, 3 Wall. (U. S.) 319; 18 L. Ed. 78, per Mr. Justice Nelson.

[38] Brickill v. City of Baltimore, 60 Fed. 101; 8 C. C. A. 502.

since in such a case it cannot be said that a market has ever been created which could be the subject of impairment by the act of the infringer.[39] As to the admissibility of general evidence, however, to show what is a reasonable royalty, where no established royalty has been shown, there has been much discussion in recent cases, based on the opinion in Coupe v. Royer.[40] This question has been raised on the strength of the following language used in that decision: "The evidence disclosing the existence of no license fee, no impairment of the plaintiff's market, in short no damages of any kind, we think the court should have instructed the jury that if they found for the plaintiffs at all, to find nominal damages."[41] This decision was referred, discussed and explained in Cassidy v. Hunt,[42] wherein it was construed as not overruling the prior decisions, to the effect that what would be a reasonable royalty may be established by evidence. In a later case, however,[43] it is declared that although the court in Coupe v. Royer[44] did not expressly hold that in an action at law the plaintiff might not prove as the measure of his damages the sum that would be a reasonable royalty for his invention, yet the plain purport of the decision is to that effect. And in a yet later case,[45] it is said that the case of Suffolk Company v. Hayden[46] must in this respect be considered as qualified if not overruled. It will be seen from these cases that the rule, as affirmed by the earlier decisions, seems to be in some dispute as to its application at the present time, but we cannot, on the basis of Coupe v. Royer,[47] consider it as overruled even in the light of the questioning decisions, in which care is taken to assert that such doctrine was not expressly overruled. That such is the tendency, however, of later decisions must be acknowledged.

§ 1258. Nominal damages.—If no established royalty is shown and there is no evidence showing the value of the inven-

[39] City of Seattle v. McNamara, 81 Fed. 865. See also Coupe v. Royer, 155 U. S. 565; 15 Sup. Ct. 199.

[40] 155 U. S. 565; 15 Sup. Ct. 199.

[41] Per Mr. Justice Shiras.

[42] 75 Fed. 1012.

[43] City of Seattle v. McNamara, 81 Fed. 863; 26 C. C. A. 652.

[44] 155 U. S. 565.

[45] City of Boston v. Allen, 91 Fed. 248.

[46] 3 Wall. (U. S.) 252.

[47] 155 U. S. 565.

tion to the defendant, except estimates of witnesses having no practical knowledge on the subject, only nominal damages can be recovered.[48] So in an action for the infringement of a design for carpets such damages only should be allowed, where the evidence fails either to show that any value was imparted to the carpets by the design or that any profits were made by defendant.[49] So also, where it is shown by defendant that his machine derived no increased value from the addition of the infringing element, the recovery will be so limited.[50] And generally, where it does not appear that the defendant derived any profit from the use of the patent, only nominal damages will be given;[51] as is also the case where, though it is apparent that there were profits, the evidence does not furnish a sufficient basis for computing the same or estimating the damages.[52] Again, in an action for the infringement of a patent, if it appear that, with equal facility and cost, the same result can be produced by other methods in common use, the plaintiff can only recover nominal damages.[53] But, in an action for infringement of grates, it has been decided that the plaintiff's recovery will not be so limited by the fact that the defendants, at the time they made and sold the complainant's grate, likewise made another kind of a grate which sold at the same price.[54]

§ 1259. Increased damages.—By the United States Revised Statutes power is conferred upon the court to increase the damages found by verdicts and to enter up judgment not exceeding three times the amount of the verdict.[55] This power may be exercised both in actions in equity or in law.[56] But it is not to be construed as authorizing an award of damages without satis-

[48] Rude v. Westcott, 130 U. S. 152; 32 L. Ed. 888; 9 S. Ct. 463; Moffitt v. Cavanagh, 27 Fed. 511.

[49] Dobson v. Hartford Carpet Co., 114 U. S. 439; 29 L. Ed. 177; 5 S. Ct. 945.

[50] Calkins v. Bertrand, 8 Fed. 755. See Tuttle v. Gaylord, 28 Fed. 97.

[51] Hohorst - Hamburg - American Packet Co., 84 Fed. 354; Everest v. Buffalo Lubricating Oil Co., 31 Fed. 742.

[52] Fischer v. Hayes, 39 Fed. 613; Roemer v. Simon, 31 Fed. 41.

[53] Black v. Thorn, 111 U. S. 122; 28 L. Ed. 372; 4 S. Ct. 326.

[54] Warren v. Keep, 155 U. S. 265; 15 S. Ct. 83; 39 L. Ed. 144.

[55] U. S. Rev. Stat. secs. 4919, 4921. See Tilghman v. Proctor, 125 U. S. 136; 31 L. Ed. 664.

[56] Nat. Folding Box & Paper Co. v. Elsas, 81 Fed. 197, aff'd 86 Fed. 917; 30 C. C. A. 487.

factory proof,[57] though the award of increased damages is said to be in the discretion of the court,[58] which has power to increase them to any amount less than treble damages.[59] Under these statutes an award of double damages has been held proper, where the finding of the master shows that the defendants were deliberate infringers, having purchased the infringing goods after the issuance of the injunction against them and where it appears that there had been a removal of their books to evade an accounting and that they did not exert themselves to produce such books.[60] And generally it is proper to increase the damages for a flagrant violation of plaintiff's rights.[61] But it has been decided that, under section 4921, allowing an increase of damages which were formerly recoverable in actions at law, there can be no increase in the recovery of profits.[62]

§ 1260. Where patent covers several claims—One only infringed.—Where a patent covers several claims and one only of these claims has been infringed, the plaintiff may show the profits or gains to the defendant by the use of the particular device covered by such claim, but evidence which only tends to show the profits from the use of the machine as an entirety is not available for this purpose.[63] In a case in which this question arose it was said: "It is to be inferred from the decree that the defendant has infringed the fourth claim only and has not infringed by using the feature specified in that claim in connection with any other patented part of the machine. If, however, the use of the fourth claim in connection with the necessary unpatented appliances for moving the dies necessarily and directly produces a gain over other devices for bending metal, then open to the public, in amount or quality of work which can be pecuniarily estimated, it is competent for the plaintiff by affirmative evidence to show that fact; but if the plaintiff does

[57] Bell v. United States Stamping Co., 32 Fed. 549.

[58] Nat. Folding Box & Paper Co. v. Elsas, 86 Fed. 917; 30 C. C. A. 487, aff'g 81 Fed. 197.

[59] Nat. Folding Box & Paper Co. v. Elsas, 81 Fed. 197, aff'd 86 Fed. 917; 30 C. C. A. 487.

[60] Nat. Folding Box & Paper Co. v. Elsas, 86 Fed. 917; 30 C. C. A. 487, aff'd 81 Fed. 197.

[61] Lyon v. Donaldson, 34 Fed. 789.

[62] Covert v. Sargent, 42 Fed. 298.

[63] Fischer v. Hayes, 22 Fed. 529.

not propose to supplement his evidence in regard to the advantage by the use of the patented machine as an entirety by affirmative evidence tending to show that either the whole profit or a proportionate part was due to the presence of the feature of the machine mentioned in the fourth claim, then the testimony already offered will not be of avail."[64] So also in such a case the license fee or royalty, usually charged for the entire patent, is not the proper measure of damages.[65]

§ 1261. Patent covering more than one claim—Nominal damages.—Where the complainant bases the amount of his recovery solely on an established license fee, and the patent covers several claims, on a part only of which he sues, if the amount of the fee is not apportioned by the evidence with any certainty among the claims, which are and which are not in litigation, he can only recover nominal damages.[66] In this case it was said: "The plaintiffs have chosen to adopt the unquestionably admissible measure of an established license fee. But they have utterly failed to prove its existence with reference to defendant's trespass. The licenses relied upon are inclusive of all the claims of the patent, of which there are seven, but the present inquiry relates to but two of them, and no evidence was adduced from which the entire fee could be, with any degree of certainty whatever, apportioned between the claims which are and those which are not involved in the litigation. The value of the part adjudged to have been taken by the defendants has not been shown at all and though, as already indicated, the law does not exact from plaintiffs in such cases more than reasonable precision of proof of the amount of their damage, it is not permissible to merely guess upon that subject any more than upon any other matter submitted for judicial investigation."[67] And such damages only are recoverable where the patent contains two claims and it appears from the evidence that the patent is valid as to one claim only, in respect to which no license fee for the separate use thereof has been shown.[68]

[64] Fischer v. Hayes, 22 Fed. 529, per Shipman, J.

[65] Wooster v. Simonson, 16 Fed. 680.

[66] Williames v. McNeely, 77 Fed. 894.

[67] Per Dallas, Cir. J. See also Hunt Bros Fruit Pkg. Co. v. Cassidy, 53 Fed. 257; 3 C. C. A. 525.

[68] Proctor v. Brill, 4 Fed. 415.

§ 1262. Device infringing in part on a patent.—If the machine or other device produced by the defendant is shown to derive its entire marketable value from the use of the infringing feature, the measure of damages may, in such case, be estimated on the basis of the entire profit made by defendant with reference to the entire infringing article.[69] But if the article manufactured by the defendant embodies the use of other valuable features not patented to the defendant but which have contributed to its market value, the latter is not liable for the use of them to the complainant.[70] And it has been said: "If such other features are patented to some third party that person is the one entitled to recover for that infringement to the extent which his patented device has contributed to the defendant's profits. But if, on the other hand, those other qualities are not patented at all, then the defendant in common with the general public has a right to apply them to his business and make the most he can of them. They belong to the common stock and there is no exclusive right to them in anyone."[71]

§ 1263. Where patent for improvement infringed.—Where the patent infringed is a mere improvement upon what was known before and was open to the defendant to use, in estimating the profits which the defendant has made by the use of plaintiffs' improvement, they should be limited to such as have arisen from the use thereof over what the defendant might have made from the use of that or other devices without such improvement.[72] And, in such a case, the burden is on the com-

[69] Crosby Steam Gauge & Valve Co. v. Consol. Safety Valve Co., 141 U. S. 441; 35 L. Ed. 809; 12 S. Ct. 49, aff'g 44 Fed. 66; Hurlburt v. Schillinger, 130 U. S. 456; 32 L. Ed. 1011; 9 S. Ct. 584; Dobson v. Hartford Carpet Co., 114 U. S. 445; 5 S. Ct. 945; Nat. Folding & Paper Box Co. v. Elsas, 86 Fed. 917; 57 U. S. App. 66; 30 C. C. A. 487; Tatum v. Gregory, 51 Fed. 446; Welling v. Leban, 34 Fed. 40; Reed v. Lawrence, 29 Fed. 915; Putnam v. Lomax, 9 Fed. 448.

[70] Reed v. Lawrence, 29 Fed. 915.

[71] Per Severens, J., citing Dobson v. Hartford Carpet Co., 114 U. S. 439; 5 S. Ct. 945; Gavetson v. Clark, 111 U. S. 120; 4 S. Ct. 291; Black v. Munson, 14 Blatchf. (U. S.) 265; Elizabeth v. Pavement Co., 97 U. S. 127; Black v. Thorne, 12 Blatchf. (U. S.) 20; Cawood Patent, 94 U. S. 695; Blake v. Robertson, 94 U. S. 728. See also Fay v. Allen, 30 Fed. 446; 24 Blatchf. (U. S.) 275.

[72] McCreary v. Penn. Canal Co., 141 U. S. 459; 35 L. Ed. 817; 12 S. Ct. 40, aff'g 5 Fed. 367; Ganetson v. Clark, 111 U. S. 120; 28 L. Ed. 371; Elizabeth v. Nicholson Pav. Co., 97

plainant to clearly establish what proportion of profits is due to his improvement.[73] So also the burden is on him, where he claims that the entire value of the machine or device sold is due to the invention and that the damages should not be apportioned, to establish such contentions.[74] And, in the absence of such evidence, only nominal damages are recoverable.[75] Where, however, it appears that the device produced by defendant owes its entire value in the market to the annexing thereto of the improvement which is infringed, an apportionment is said to be unnecessary.[76]

§ 1264. Where improvements are added—Apportionment of damages.—In an action for the infringement of a patent, though it may appear that the defendant took the whole of the vital and effective part of the invention, yet, if he adds thereto an improvement which contributes to the saving which he obtained, he is entitled to an apportionment of the damages, the burden, however, being upon him to show that some portion of the profits was a result of the improvement annexed.[77]

§ 1265. Interest on profits.—In equity the profits which are allowed to the owner of a patent for the injury which he has sustained in consequence of the infringement of the same, are considered as a measure of unliquidated damages and, as a general

U. S. 126; 24 L. Ed. 1000; Littlefield v. Perry, 21 Wall. (U. S.) 205; 22 L. Ed. 577; Mowry v. Perry, 14 Wall. (U. S.) 620; 20 L. Ed. 860; Seymour v. McCormick, 16 How. (U. S.) 480; 14 L. Ed. 1024; Buerk v. Imhanser, 14 Blatchf. (U. S.) 19; Fed. Cas. No. 2107; Mosher v. Joyce, 51 Fed. 441; 2 C. C. A. 322, aff'g 45 Fed. 205; Fay v. Allen, 30 Fed. 446; Maier v. Brown, 17 Fed. 736.

[73] Elizabeth v. Nicholson Pav. Co., 97 U. S. 126; 24 L. Ed. 1000; Mosher v. Joyce, 51 Fed. 441; 2 C. C. A. 322, aff'g 45 Fed. 205; Fay v. Allen, 30 Fed. 446; Bostock v. Goodrich, 25 Fed. 819; Kirby v. Armstrong, 5 Fed. 801.

[74] Fay v. Allen, 30 Fed. 446; Ganetson v. Clark, 111 U. S. 120; 28 L. Ed. 371; 4 S. Ct. 291.

[75] Robertson v. Blake, 94 U. S. 728; 24 L. Ed. 245; New York v. Ransom, 23 How. (U. S.) 487; 16 L. Ed. 515; Bostock v. Goodrich, 25 Fed. 819.

[76] Fitch v. Bragg, 21 Blatchf. (U. S.) 302; 16 Fed. 243.

[77] Tuttle v. Claflin, 76 Fed. 227; 22 C. C. A. 138, modifying 62 Fed. 453, citing Elizabeth v. Pavement Co., 97 U. S. 126; 24 L. Ed. 1000; Crosby Steam Gauge & Valve Co. v. Consol. Safety Valve Co., 141 U. S. 441; 12 Sup. Ct. 49; 35 L. Ed. 809.

rule, do not bear interest until the amount has been judicially ascertained.[78]

§ 1266. Interest—Money invested in defendant's plant.—In the absence of evidence which would permit of a satisfactory and proper apportionment of the interest between the several kinds of business for which a plant is used, there should be no allowance, in the defendant's favor, of interest upon the money invested in such plant.[79] In the decision just cited it was said: "We do not wish to be understood as holding that in no case where the plaintiff's damages are measured by the defendant's profits ought there to be an allowance in the latter's favor of interest on the money invested in the plant. Nor do we say that such an allowance may not be properly made, even where the use of the plant is not wholly restricted to making the infringing article. But the evidence in such a case should enable the master to satisfactorily apportion the interest between the several different kinds of business."[80] So, in such a case, interest has been allowed on the value of a plant, where the machinery was used for no other purpose than the manufacturing of the infringing device.[81]

§ 1267. Infringement of copyright.—The remedy for the infringement of a copyright has been provided for by the United States Revised Statutes.[82] The practice which has been gen-

[78] Tilghman v. Proctor, 125 U. S. 136; 31 L. Ed. 672; Illinois Cent. R. R. Co. v. Turrill, 110 U. S. 303; 28 L. Ed. 155; Root v. R. R. Co., 105 U. S. 189, 198, 200, 204; 26 L. Ed. 975, 978–980; Parks v. Booth, 102 U. S. 96, 106; 26 L. Ed. 54, 58; Littlefield v. Perry, 21 Wall. (U. S.) 205; 22 L. Ed. 577; Mowry v. Whiteney, 14 Wall. (U. S.) 620, 651; 20 L. Ed. 860, 866; Silsby v. Foote, 20 How. (U. S.) 378, 387; 15 L. Ed. 953, 956.

[79] Seabury v. Am Ende, 152 U. S. 561; 38 L. Ed. 553; 14 S. Ct. 683, aff'g 43 Fed. 672, dist'g Gould's Mfg. Co. v. Cowing, 105 U. S. 257; 26 L. Ed. 988. See also Providence Rubber Co. v. Goodyear, 9 Wall. (U. S.) 804; 19 L. Ed. 571.

[80] Per Mr. Justice Shiras.

[81] Gould's Mfg. Co. v. Cowing, 105 U. S. 257; 26 L. Ed. 988.

[82] See the following provisions therein contained: "Every person who, after recording of the title of any book as provided by this chapter, shall within the term limited and without the consent of the proprietor of the copyright first obtained in writing, signed in the presence of two or more witnesses, print, publish or import, or knowing the same to be so printed, published or imported, shall sell or expose to

erally followed seems to have been in equity for an injunction, and, where such a procedure is adopted, there may be a recovery also for profits.[83] But, in such an action, damages also are not recoverable as in the case of patents.[84]

§ 1268. Action for injunction not bar to action for damages.—The bringing of an action in equity for an injunction to restrain infringement of a copyright, in which an accounting of profits is asked, will not operate as a bar to a subsequent action for damages for such infringement, where, in the equity suit, the plaintiff did not pursue his claim for such an accounting and none was in fact had nor any decree given in regard thereto nor any recovery had.[85]

sale any copy of such book shall forfeit every copy thereof to such proprietor, and shall also forfeit and pay such damages as may be recovered in a civil action by such proprietor in any court of competent jurisdiction." U. S. Rev. Stat. sec. 4964. "Any person publicly performing or representing any dramatic composition for which a copyright has been obtained, without the consent of the proprietor thereof, or his heirs or assigns, shall be liable for damages therefor, such damages in all cases to be assessed at such sum not less than $100 for the first and $50 for every subsequent performance, as to the court shall appear to be just." U. S. Rev. Stat. sec. 4966. "Every person who shall print or publish any manuscript whatever, without consent of the author or proprietor first obtained, if such author or proprietor is a citizen of the United States, or a resident therein, shall be liable to the author or proprietor for all damages occasioned by such injury." U. S. Rev. Stat. sec. 4967.

[83] Brady v. Daly, 175 U. S. 148; 44 L. Ed. 109; Chapman v. Ferry, 12 Fed. 693. As to rights generally in such cases, see Folson v. Marsh, 2 Story (U. S.), 115; Gray v. Russell, 1 Story (U. S.), 19; Story's Executors v. Holcombe, 4 McLean (U. S.), 306; Webb v. Powers, 2 Wood & M. (U. S.) 497; Wheaton v. Peters, 8 Pet. (U. S.) 657; Boucicault v. Hart, 13 Blatchf. (U. S.) 47; Fed. Cas. No. 1692; Day v. Palmer, 6 Blatchf. (U. S.) 256; Fed. Cas. No. 3552.

[84] Sec. 4921 of U. S. Rev. Stat. does not apply in case of copyright. Chapman v. Ferry, 12 Fed. 695.

[85] Brady v. Daly, 175 U. S. 148, 160; 44 L. Ed. 109, 114. In this case it was said: "The plaintiff in error further claimed that the plaintiff below, by first proceeding in equity for an injunction, and incidentally for an accounting for profits, made an election to recover profits, which effectually barred him from a recovery of damages under the statute. The equity action was brought to enjoin the defendant from performing the play of, 'After Dark,' with the railroad scene in it, taken from the plaintiff's play, 'Under the Gaslight,' and the injunction was asked for on the ground that the plaintiff's injuries could not be accurately ascertained or computed, and compensation for such injury could not

§ 1269. Copyright—Partial infringement—When entire profits recoverable.—Though only portions of a copyrighted work are copied into an infringement, yet, if such portions are so intermingled with the rest of the infringer's work that they cannot well be distinguished from it, there may be a recovery by the plaintiff of the entire profits made by defendant.[86]

§ 1270. Copyright of advertising pamphlet infringed.—In an action for the infringement of a pamphlet by the publication of parts thereof in a newspaper, the chief purpose of such pamphlet being to advertise plaintiff's business, where, from the evidence, it is doubtful whether the pamphlet has any commercial value and it has never been sold or offered for sale, several copies, however, having been distributed free, and there is no evidence from which the court may determine how its commercial value was affected by such publication, there is not enough to enable the court to determine plaintiff's loss with sufficient certainty to warrant a judgment for substantial damages.[87]

be made by damages, and as a portion of the relief complainant asked that the defendant do by decree render a full and true account of all money and profits received by him. The decree in that case, however, did not direct the master to ascertain anything in regard to profits; no evidence was offered upon that subject; no finding was made thereon; upon the coming in of the master's report, no final judgment or decree for profits was ever asked or rendered. In view of these facts, we think there was no election of a consistent remedy by the plaintiff in the action which would bar him from the maintenance of this action for the recovery of damages under the section of the Revised Statutes, before referred to. Considering that he might in the equity suit have recovered profits if there had been an accounting concerning the same, and that a decree for their recovery would be a bar to a proceeding under the statute, yet the plaintiff was not bound to take such remedy; and when in fact he did not take it, and there was no accounting for profits in equity suit, no decree made in regard to them and no recovery had, we see nothing to prevent the plaintiff in this action from recovery, under the statute, the damages which he has sustained by reason of the infringement of his copyright by the defendant." Per Mr. Justice Peckham.

[86] Belford, Clarke & Co. v. Scribner, 144 U. S. 488; 36 L. Ed. 514; Callaghan v. Myers, 128 U. S. 617; 32 L. Ed. 547. See Mawman v. Tegg, 2 Russ. 385, 391.

[87] D'Ole v. Kansas City Star Co., 94 Fed. 840, 841. In this case it was said by Mr. Justice Phillips: "He never sold a single copy of the pamphlet, nor even offered it for

§ 1271. Statute as to minimum damages—Penalty—Power of court.—It is provided by the United States Revised Statutes that in certain cases of the violation of the copyright of dramatic compositions, the person so infringing shall be liable for damages therefor to not less than one hundred dollars for the first performance and fifty dollars for every subsequent performance as to the court shall appear to be just.[88] This statute has been construed as penal rather than remedial in its character.[89] And in an action thereunder the court has no power to reduce the minimum damages prescribed, though the actual damages may be in fact less. In this connection it is said: "The amount is not to be measured by the pecuniary injury but in all cases is to be the statutory sum, subject to be increased if the circumstances of aggravation or of injury or of wilfulness shall convince the tribunal that justice requires an increase. The phraseology of the section suggests a punitive rather than

sale. He had never, prior to this publication of The Star, had any estimation made by any publishing house or merchant, or other person, as to any terms upon which they would undertake its sale. And the only evidence offered at this trial in respect to its commercial value is his statement and of one other witness, to the effect that they thought it could be sold by some business house to persons who might desire to have their photographs taken. Other photographers, while witnesses in the case—experienced photographers — testify that they had seen other pamphlets of a not dissimilar character, and that the information contained therein was quite common to the profession, and that they did not regard the pamphlet as possessing any commercial value. From which it is quite apparent that any estimation that the court could place on its value would be highly speculative. Furthermore, how could the court, with any degree of required certainty, justify the assessment of damages against the defendant, and determine what damage resulted to the plaintiff from such publication in this newspaper. The defendant did not distribute, attempt to distribute, or sell, a single copy of this pamphlet after the publication of the newspaper, to enable the court by comparison to determine in the remotest how the commercial value of his pamphlet was affected by such publication. He could not, without such test or effort, content himself by simply saying that he assumed that his exclusive property in the pamphlet was injured by the newspaper publication, and that it would be useless for him to make the effort to dispose of the pamphlet. Such a method of constituting a basis for the assessment of damages would be too easy for the plaintiff, and would certainly be an unsafe criterion for the court to recognize in assessing such damages."

[88] U. S. Rev. Stat. sec. 4966.

[89] Daly v. Brady, 69 Fed. 285.

a remedial purpose, and the phraseology of the statute as originally passed in 1831[90] conveyed the same suggestion that a penalty was to be inflicted rather than that a recompense for the injury was to be obtained." [91]

§ 1272. Trade-marks—Measure of damages.—That a person has a right or property in a trade-mark, which he has adopted to distinguish his goods from other similar goods, and that he is entitled to its exclusive use, is well settled at law. An invasion of his right will be protected by injunction; and where it has been invaded by illegal use or imitation, he may recover from the wrongdoer the damages which he has sustained, as a result thereof, which will ordinarily be the loss of profits caused by the illegal or fraudulent infringement.[92] So it has been held that the measure of damages, in such a case, are measured by the extent to which the unlawful use of the trade-mark has interfered with the sales of plaintiff's goods,[93] and the plaintiff may show a falling off of his custom, concurrent with the commencement by defendant of the use of the former's trade-mark.[94] The right to recover damages for the infringement of a trade-mark is also provided for by the United States Revised Statutes.[95]

[90] 4 Stat. 438.

[91] Daly v. Brady, 69 Fed. 290.

[92] Hostetter v. Vowinkle, 1 Dill. 329; Fed. Cas. No. 6714, citing Candee v. Deere, 54 Ill. 439; Motley v. Dounman, 3 Mylne & C. 1; Millington v. Fox, 3 Mylne & C. 338; Eden, Inj. ch. 14, p. 314; Story, Eq. Jur. sec. 951; Taylor v. Carpenter, Fed. Cas. No. 13,785; Walton v. Crowley, Fed. Cas. No. 17,133; Coffeen v. Brunton, Fed. Cas. No. 2940; Seixo v. Provezende, 1 Ch. App. 194; Amoskeag Mfg. Co. v. Spear, 2 Sandf. 606; Filley v. Bassett, 44 Mo. 168, and cases cited; Gillott v. Esterbrook, 47 Barb. 269; Burnett v. Phalon, 9 Bosw. 192; Croft v. Day, 7 Beav. 89; Edeson v. Vick, 23 Eng. Law & Eq. 53.

[93] Atlantic Milling Co. v. Robinson, 20 Fed. 217. See also Taylor v. Carpenter, 2 W. & M. 1; Fed. Cas. No. 13,785.

[94] Shaw v. Pilling, 175 Pa. 78; 34 Atl. 446.

[95] "Any person who shall reproduce, copy or imitate any recorded trade-mark and affix the same to goods of substantially the same description shall be liable to action on a case for damages for such wrongful use of such trade-mark, at the suit of the owner thereof; and the party aggrieved shall also have his remedy according to the courts of equity to enjoin the wrongful use of his trade-mark and to recover compensation therefor in any court having jurisdiction over the person guilty of such wrongful use." U. S. Rev. Stat. sec. 4942.

§ 1273. Trade-marks—Profits of defendant.—The plaintiff's recovery is not in all cases measured by the loss of sales which he has sustained, but he may be entitled to recover the profits, which have been made by the defendant, which are due to the use of the trade-mark only, and he may so recover, without regard to the fact whether the same profits would have been made by him or not.[96] And if it cannot be determined with any reasonable certainty what proportion of the profit is due to the trade-mark and what to the intrinsic value of the commodity, the plaintiff may recover the whole profit made by the defendant for "it is more consonant with reason and justice that the owner of the trade-mark should have the whole profit than that he should be deprived of any part of it by the fraudulent act of the defendant. It is the same principle which is applicable to a confusion of goods. If one wrongfully intermixes his own goods with those of another, so that they cannot be distinguished and separated, he shall lose the whole, for the reason that the fault is his and it is but just that he should suffer the loss rather than an innocent party who in no degree contributed to the wrong."[97] If, however, the trade-mark infringed belongs to several manufacturers, the wrongdoer should not be required to pay one of them for all the benefits resulting from the infringement, but he should be held responsible to each for the profits diverted from him.[98]

§ 1274. Trade-name—Nominal damages.—Where, in an action for the illegal use of a trade-name, the evidence fails to disclose that the complainant is entitled to any recovery of profits and it not appearing that anyone had purchased goods made by defendant, or that a single customer had been lost to plaintiff in consequence thereof, only nominal damages should be awarded.[99]

[96] Atlantic Milling Co. v. Rowland, 27 Fed. 25.

[97] Graham v. Plate, 40 Cal. 593; 6 Am. Rep. 639, per Crockett, J. The court also said in this case: "I think therefore there was no error in awarding to the plaintiff the whole profit made by defendant. This view of the law appears to be supported by the following authorities: Coats v. Holbrook, 2 Sandf. Ch. R. 611; Upton on Trade-Marks, p. 245; Spottswood v. Clark, 2 Sandf. Ch. R. 629." See also Benkert v. Feder, 34 Fed. 535, where the same doctrine is affirmed.

[98] Clark Thread Co. v. William Clark Co., 56 N. J. Eq. 789; 40 Atl. 686, rev'g 55 N. J. Eq. 658; 37 Atl. 599.

[99] Baker v. Baker, 115 Fed. 297.

TITLE VIII.

CONTRACTS.

CHAPTER LI.

BREACH OF CONTRACT—GENERAL PRINCIPLES.

§ 1275. Breach of contract — Generally.
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§ 1275. Breach of contract — Generally.—Where parties enter into a contract which one of them breaks or is disabled from performing, the other will be entitled to damages for the nonperformance.[1] And where the contract is in reference to property, there may be a recovery without regard to the ownership thereof.[2] And the damages to which plaintiff is entitled for the breach of a contract should operate as a complete idemnity for the loss sustained.[3] Again, where at the time of the commencement of the action a contract has been broken and it has not been terminated by the efflux of time, damages down to the time of the trial may in some cases be recovered by the plain-

[1] Skinner v. White, 17 Johns. (N. Y.) 357.
Quackenboss v. Edgar, 2 J. & S. (N. Y.) 333, aff'd 61 N. Y. 653.

[3] Orr v. Bigelow, 14 N. Y. 556; 20 Barb. 21.

tiff.[4] But one who has refused to perform his part of the contract cannot recover damages from the other party for a breach thereof by the latter.[5] And it must appear in an action for breach of a contract prior to the time stipulated for its performance, that there has been a clear repudiation of the contract by the other party thereto, either by some act rendering performance impossible or by express declaration refusing to perform.[6] Again, in an action for breach of a contract, the jury in awarding damages therefor are not authorized to disregard the evidence in the case as to the extent of such damages and award a less sum, and in case they do so, the verdict so rendered will be set aside.[7]

§ 1276. Contracts against public policy—Statute of frauds.—A contract which is shown by the evidence to be against public policy, good morals, or the express mandate of the law cannot be made the basis of any action legal or equitable and no damages are recoverable for the breach of such a contract.[8] And it has also been held that no damages are recoverable for the breach of a contract which is void under the statute of frauds.[9] As a general rule, however, in case of the breach of a contract of the latter class, there may be a recovery of such expenses as have been incurred in pursuance of the contract or for the value of services performed under the same.[10]

§ 1277. Express and implied contracts.—Contracts may be divided into those which are express and those which are implied. In actions upon the former the recovery is, as a general rule, to be determined from the contract itself, while in those upon the latter class, in which the law implies a promise to pay

[4] Behrman v. Linde, 23 N. Y. St. R. 490; 5 N. Y. Supp. 898; Cummings v. Hansen, 63 How. Pr. (N. Y.) 351.

[5] Hale v. Sheehan, 52 Neb. 184; 71 N. W. 1019.

[6] McIntosh v. Miner, 37 App. Div. (N. Y.) 483; 55 N. Y. Supp. 1074.

[7] Forbes v. McClatchey, 52 Neb. 182; 71 N. W. 1012.

[8] Gibbs v. Consol. Gas. Co., 130 U. S. 396; Ball v. Putnam, 123 Cal. 134; 55 Pac. 773; Sabine Tram Co. v. Bancroft, 16 Tex. Civ. App. 170; 40 S. W. 837.

[9] Butler v. Shehan, 61 Ill. App. 561.

[10] Fuller v. Reed, 38 Cal. 99; Welch v. Lawson, 32 Miss. 170; Ham v. Goodrich, 37 N. H. 185; Rosepaugh v. Vredenburgh, 16 Hun (N. Y.), 60; Bender v. Bender, 37 Pa. St. 419.

a reasonable value or compensation as for property transferred or services rendered, the recovery is to be determined upon this basis, that is, on a quantum valebat or quantum meruit.[11]

§ 1278. Where cause of action is indivisible.—Where a breach of contract has created but one cause of action in favor of the plaintiff, such cause of action is declared to be indivisible, and a party cannot sever a claim for damages arising under one contract so as to make two distinct and substantive causes of action, and the compensation for this breach will include all he is entitled to recover under the contract, including both past and future losses.[12] So there may be joined in one action a claim for loss of anticipated profits with a claim to recover losses for actual outlay and expenditures, and where the facts are properly set out in accordance with the rules of pleading of the court in which the action is brought, a party cannot be required to elect whatever he will claim for losses and expenses incurred on the faith of the contract or for the loss of profits.[13]

§ 1279. Measure of damages—Generally.—In an action for a breach of a contract, plaintiff's recovery should be limited to a compensation for the actual loss which he has sustained, to be determined as a general rule from the contract itself,[14] the damages being either those which are the direct, probable and natural result of the breach according to the usual course of things,[15] or which may reasonably be supposed to have been in

[11] Turner v. Webster, 24 Kan. 38; Chase v. Corcoran, 106 Mass. 286; Leland v. Stone, 10 Mass. 459; Watson v. Bigelow, 47 Mo. 413; McDowell v. Oyer, 21 Pa. St. 417.

[12] Dennis v. Maxfield, 10 Allen (Mass.), 138.

[13] Wells v. National Life Assn., 99 Fed. 222; 39 C. C. A. 476.

[14] Magdeburg Gen. Ins. Co. v. Paulson, 29 Fed. 530; King v. Gilson, 32 Ill. 348; 83 Am. Dec. 269; Osborne v. Stassen, 25 Kan. 736; Stern v. Rosenheim, 67 Md. 503; 10 Atl. 221; 8 Cent. 881; Banewur v. Levenson, 171 Mass. 1; 50 N. E. 10; Kaiser v. New Orleans, 17 La. Ann. 178; Paine v. Sherwood, 21 Minn. 225; Ganson v. Tifft, 71 N. Y. 48; Starbird v. Barrows, 38 N. Y. 230; Cross v. Beard, 26 N. Y. 85; Duche v. Wilson, 37 Hun (N. Y.), 519; Dunn v. Allen, 55 App. Div. (N. Y.) 637; 59 App. Div. (N. Y.) 561; 67 N. Y. Supp. 218; Shannon v. Comstock, 21 Wend. (N. Y.) 457; 34 Am. Dec. 262.

[15] Taylor Mfg. Co. v. Hatcher, 39 Fed. 440; 3 L. R. A. 587; Western Union Teleg. Co. v. Way, 83 Ala. 542; 4 So. 844; Bryson v. McCone, 121 Cal. 153; 53 Pac. 637; Taylor v.

the contemplation of the parties in making the contract as the probable result of the breach.[16] And if the contract were made under special circumstances which were known to both parties, then the measure of damages would be the amount of the injury which would ordinarily follow from the breach under the special circumstances so known, but if such special circumstances were unknown to the party breaking the contract, and damages therefor could not be considered as within his contemplation, or as a natural result of a breach, then the damages should be estimated without regard thereto.[17] This general rule is in substance that stated in Hadley v. Baxendale,[18] by Alderson, B., which has been so widely quoted and followed and is to-day the recognized rule of damages in actions for breach of contract.

§ 1280. Hadley v. Baxendale.—The case of Hadley v. Baxendale,[19] referred to in the preceding section, is generally cited as the leading one upon the question of damages for breach of contract. It appeared in this case that the plaintiff, who was a miller, had sent by a common carrier a broken shaft to be delivered to an artificer to serve as a model for a new shaft. The miller had no other shaft, and in consequence his mill remained

Bradley, 39 N. Y. 129; Leach v. New York, N. H. & H. R. Co., 89 Hun (N. Y.), 377; 69 N. Y. St. R. 749; Rochester Lantern Works v. Stiles & P. Press Co., 40 N. Y. St. R. 851; 16 N. Y. Supp. 781; Alfaro v. Davidson, 8 J. & S. (N. Y.) 87; Fitch v. Fitch, 3 J. & S. (N. Y.) 302. As to the natural and probable consequences and compensatory damages generally for breach of contract, see sections, *post*, herein.

[16] Boutin v. Rudd, 82 Fed. 685; 53 U. S. App. 525; 27 C. C. A. 526; Hunt v. Oregon Pac. R. Co., 36 Fed. 481; 1 L. R. A. 842; Hamilton v. McPherson, 28 N. Y. 72: Cassidy v. Le Fevre, 45 N. Y. 562; Medbury v. New York & Erie R. R. Co., 26 N. Y. 564; Parker v. Oil Well Supply Co., 186 Pa. St. 294; 29 Pitts. L. J. N. S. 31; 40 Atl. 518; Hutchinson v. Snider, 137 Pa. St. 1; 20 Atl. 510; 26 W. N. C. 531; 47 Phila. Leg. Int. 494; 21 Pitts L. J. N. S. 186; Bradley v. Chic. M. & St. P. R. Co., 94 Wis. 44; 68 N. W. 410; 5 Am. & Eng. R. Cas. N. S. 40.

[17] Boutin v. Rudd, 82 Fed. 685; 27 C. C. A. 526; 53 U. S. App. 526; Taylor Mfg. Co. v. Hatcher, 39 Fed. 440; 3 L. R. A. 587; Holland v. 725 Tons Coal, 36 Fed. 784; Western Un. Teleg. Co. v. Way, 83 Ala. 542; 4 So. 844; Freeman v. Dempsey, 41 Ill. App. 554; Keystone Drilling Co. v. Stahl, 17 Pa. Co. Ct. 498; 26 Pitts. L. J. N. S. 418; Parks v. O'Connor, 70 Tex. 377; 8 S. W. 104. See sec. 1280 herein.

[18] 9 Exch. 341; 26 Eng. L. & E. 398.

[19] 9 Exch. 341; 26 Eg. L. & Eq. 398.

idle until a new shaft could be supplied. Of this fact, however, the carrier was not aware. The shaft was unreasonably delayed in its delivery to the artificer, and as a result there was a delay in supplying the new shaft. The miller sued the carrier for breach of his contract, and it was held that he could not recover as damages the loss or profits incurred by the stoppage of his mill. In this case it was said by Alderson, B.: "We think the proper rule in such a case as the present is this: Where two parties have made a contract which one of them has broken, the damages which the other party ought to receive in respect of such breach of contract should be either such as may fairly and reasonably be considered arising naturally; that is, according to the usual course of things from such breach of contract itself, or such as may reasonably be supposed to have been in the contemplation of both parties at the time they made the contract as the probable result of a breach of it. Now, if the special circumstances under which the contract was actually made were communicated by the plaintiff to the defendant, and thus known to both parties, the damages resulting from the breach of such a contract which they would reasonably contemplate would be the amount of injury which would ordinarily follow from a breach of contract under those special circumstances so known and communicated. But on the other hand, if those special circumstances were wholly unknown to the party breaking the contract, he at the most could only be supposed to have had in his contemplation the amount of injury which would arise generally and in the great multitude of cases not affected by any special circumstances from such a breach of contract. For had the special circumstances been known, the parties might have especially provided for the breach of contract by special terms as to the damages in that case, and of this advantage it would be very unjust to deprive them. The above principles are those by which we think the jury ought to be guided in estimating the damages arising out of any breach of contract. It is said that other cases, such as breaches of contract in the nonpayment of money or in the not making a good title to land, are to be treated as exceptions from this and as governed by a conventional rule. But as in such cases both parties must be supposed to be cognizant of that well-known

rule these cases may, we think, be more properly classed under the rule above enunciated as to cases under known special circumstances, because there both parties may reasonably be presumed to contemplate the estimation of the amount of damages according to the conventional rule."

§ 1281. Consideration does not determine.—Where, for a certain consideration, a person contracts with another to perform some act, the measure of damages, in an action against the former for a breach of such contract, is not the amount of the consideration, but is rather to be determined by the value of performance on the part of such person.[20] So where a grandfather agreed to leave a granddaughter by will as much as any daughter, in consideration of services to be performed by her, it was decided that the measure of damages for a breach of such agreement was not the value of such services, but that there might be a recovery of the difference between the sum actually left and that given the least favored daughter.[21] So also, where a person agrees not to make any testamentary disposition of a trust fund left by her husband and remaining at her decease, which will prevent it from going in accordance with the provisions of her husband's will, in consideration of a contract to protect the widow's estate from all claims, the measure of damages for a breach of the latter contract will be the whole loss suffered by her estate by reason of such breach, and not the amount paid for such covenant.[22]

§ 1282. Damages must be proved.—In order to recover substantial damages for the breach of a contract the plaintiff must prove the amount of his loss by evidence from which it can be computed with reasonable certainty and it must not be left to speculation or conjecture.[23] But a recovery of damages will not

[20] Weddle v. Stone, 12 Ind. 626; Gantz v. Clark, 31 Iowa, 254; Bell v. Walker, 5 Jones' L. (N. C.) 43.

[21] Smith v. McGugan, 21 Ont. App. 542. See also Re Mallory's Estate, 13 Misc. (N. Y.) 595. But see Rhea v. Meyers, 111 Mich. 140; 69 N. W. 239; 3 Det. L. N. 616.

[22] Bullard v. Moor, 158 Mass. 418; 33 N. E. 929.

[23] Telfener v. Russ, 145 U. S. 522; 36 L. Ed. 800; 12 Sup. Ct. 933; Hubbard Specialty & Mfg. Co. v. Minneapolis Wood-Designing Co., 47 Minn. 390; 50 N. W. 349; Neary v. Bostwick, 2 Hilt. (N. Y.) 514; Fox v. Decker, 3 E. D. Sm. (N. Y.) 150.

be prevented because exact and absolute proof of the amount is unattainable,[24] or because the proof and estimate of damage may be difficult,[25] or because the damages are incapable of being reduced to an exact money standard.[26]

§ 1283. Nominal damages.—In an action for the breach of a contract if the breach be established, plaintiff will be entitled to recover nominal damages though it does not appear that any actual damage has been sustained by him, for in such case the law presumes damages from the breach.[27] And in the absence of proof of actual damage, recovery will be limited to nominal damages.[28] Again, it has been decided that such damages are recoverable though it appear that performance of the contract would have been a positive injury to the plaintiff.[29] The failure however to assess nominal damages in an action for a breach of a contract is not such an error affecting the substan-

[24] Taylor Mfg. Co. v. Hatcher, 39 Fed. 440; 3 L. R. A. 587.

[25] Brooklyn Elev. R. Co. v. Brooklyn B. & W. E. R. Co., 23 App. Div. (N. Y.) 29; 48 N. Y. Supp. 665.

[26] Barngrover v. Maack, 46 Mo. App. 407; Stowell v. Greenwich Ins. Co., 20 App. Div. (N. Y.) 188; 46 N. Y. Supp. 802.

[27] Oh Chow v. Hallett, Fed. Cas. No. 10,469; 2 Sawy. (N. S.) 259; Treadwell v. Tillis, 108 Ala. 262; 18 So. 886; Western Un. Teleg. Co. v. Aubrey, 61 Ark. 613; 33 S. W. 1063; Hancock v. Hubbell, 71 Cal. 537; 12 Pac. 618; Brouner v. Davis, 15 Cal. 9; Excelsior Needle Co. v. Smith, 61 Conn. 56; 23 Atl. 693; Addington v. Western & A. R. Co., 93 Ga. 566; 20 S. E. 71; Green v. Weaver, 63 Ga. 302; Stock Quotation Teleg. Co. v. Board of Trade, 44 Ill. App. 358; Turpie v. Lowe, 114 Ind. 37; 15 N. E. 834; Browning v. Simons, 17 Ind. App. 45; 46 N. E. 86; Howard v. Wilmington & S. R. Co. 1 Gill. (Md.) 311; Hogan v. Riley, 13 Gray (Mass.), 515; Cowley v. Davidson, 10 Minn. 392; Middleton v. Moore, 36 Mo. App. 627; Mollyneaux v. Wittenberg, 39 Neb. 547; 58 N. W. 205; New Jersey School & C. F. Co. v. Somerville Board of Ed., 58 N. J. L. 646; 35 Atl. 397; Devendorf v. Wert, 42 Barb. (N. Y.) 227; Bond v. Hilton, 2 Jones' L. (N. C.) 149; First Nat. Bank v. Teleg. Co., 30 Ohio St. 555; 27 Am. Rep. 485; Seat v. Moreland, 7 Humph. (Tenn.) 575; Hope v. Alley, 9 Tex. 394.

[28] Troy Laundry Mach. Co. v. Dolph, 138 U. S. 617; 34 L. Ed. 1083; 11 Sup. Ct. 412; Turney v. Peoria Grape Sugar Co., 65 Ill. App. 656; Reid v. Johnson, 132 Ind. 416; 31 N. E. 1107; Supreme Lodge K. of P. v. Knight, 117 Ind. 489; 3 L. R. A. 409; 20 N. E. 479; Turpie v. Lowe, 114 Ind. 37; 15 N. E. 834; Wilson v. Wagar, 26 Mich. 452; Gerli v. Poidebard Silk Mfg. Co., 57 N. J. L. 432; 31 Atl. 401; 30 L. R. A. 61; Cantor v. Tattersall, 13 Misc. (N. Y.) 17; 34 N. Y. Supp. 96; Hibbard v. Western Un. Teleg. Co., 33 Wis. 558.

[29] Ellsler v. Brooks, 22 J. & S. (N. Y.) 73.

tial rights of the parties as will entitle the one in whose favor they should have been assessed to a reversal.[30] And it has been held that on a judgment by default in debt, nominal damages are not given.[31]

§ 1284. Remote damages.—Damages which are uncertain or speculative, or which are not the natural and probable results of the breach or which could not reasonably have been in the contemplation of the parties at the time of entering into the contract as a probable result of a breach thereof are too remote to be recoverable.[32] The rule, however, that uncertain or contingent damages are not recoverable, does not apply to an uncertainty as to the value of the benefit or gain to be derived from performance but has reference to an uncertainty or contingency whether any such gain or benefit would be derived at all.[33] As to what damages are recoverable, it has been decided that expenditures caused by apprehension of injuries based upon mere rumors cannot be recovered.[34] And where as the result of a breach of a contract for the use of a well, horses died while seeking for water while being driven a distance of twelve miles, recovery of their value was held too remote.[35] And where a loss is sustained for the purpose of enabling the plaintiff to fulfill a contract, such loss being in noway connected with the breach of such contract, there can be no recovery for this loss in an action for the breach.[36] Again, losses due to inability to fulfill contracts with others though resulting partly from the breach of the contract for which the action is brought are not recoverable.[37]

§ 1285. Loss of profits.—Where there has been a breach of

[30] United States v. Patrick, 73 Fed. 800; 36 U. S. App. 645; 20 C. C. A. 11; State v. French, 60 Conn. 478; 23 Atl. 153; Wadhams v. Swan, 109 Ill. 46; Coffin v. State, 144 Ind. 578; 43 N. E. 654; Brantingham v. Fay, 1 Johns. Cas. (N. Y.) 255.

[31] People v. Hallett, 4 Cow. (N. Y.) 67.

[32] See secs. 84–88, 90–93, herein, as to remote damages generally.

[33] Blagen v. Thompson, 23 Oreg. 239; 18 L. R. A. 315; 31 Pac. 647.

[34] Holt v. Silver, 169 Mass. 435; 48 N. E. 837.

[35] Westfall v. Perry (Tex. Civ. App.), 23 S. W. 740.

[36] Candy v. Candy, 10 Hun (N. Y.), 88.

[37] Lowenstein v. Chappell, 30 Barb. (N. Y.) 241. See also Webster v. Woolford (Md.), 32 Atl. 319; Cotes v. Sparkman (Tex.), 11 S. W. 846.

a contract there may in an action therefor be a recovery for loss of profits but the loss must result directly and immediately from the breach of such contract itself or be such as might reasonably be supposed to have been in the contemplation of the parties at the time of the making of the contract as the result of the breach thereof, and the profits must be capable of being ascertained from the rules of evidence to a reasonable degree of certainty.[38] But it is said the court should not be too exacting as to the evidence on which to base a claim for damages for loss of profits.[39] So profits, which land would ordinarily produce and which do not form a constituent element of a contract and the amount of which cannot be determined with reasonable certainty, being therefore contingent and speculative, cannot be recovered.[40] And for failure to give a tenant possession of leased premises there can be no recovery of anticipated profits from a business which

[38] Hitchcock v. Anthony, 83 Fed. 779; 54 U. S. App. 439; 28 C. C. A. 80; Taylor Mfg. Co. v. Hatcher, 39 Fed. 440; 3 L. R. A. 587; Hunt v. Oregon Pac. R. Co., 36 Fed. 418; 1 L. R. A. 842; Goldhammer v. Dyer, 7 Colo. App. 29; 42 Pac. 177; Washington & G. R. Co. v. American Car Co. (D. C. App.), 23 Wash. L. Rep. 241, reh'g denied 23 Wash. L. Rep. 246; Keeler v. Clifford, 165 Ill. 544; 46 N. E. 248, aff'g 62 Ill. App. 64; Siegel v. Eaton & P. Co., 165 Ill. 550; 46 N. E. 449; 44 Cent. L. J. 367, aff'g 60 Ill. App. 639; Lake Shore & M. S. R. Co. v. Richards, 40 Ill. App. 560; Blymer Ice Mach. Co. v. McDonald, 48 La. Ann. 439; 19 So. 459; Fell v. Newberry, 106 Mich. 542; 64 N. W. 474; 2 Det. L. N. 507; Silberstein v. News Tribune Co., 68 Minn. 430; 71 N. W. 622; Western Un. Teleg. Co. v. Wilhelm, 48 Neb. 910; 67 N. W. 870; 4 Am. & Eng. Corp. Cas. N. S. 233; Wolcott v. Mount, 36 N. J. 262; 13 Am. Rep. 438; Danolds v. New York, 89 N. Y. 36; Rathbone, Hair & Ridgeway Co. v. Wheelihan (Minn. 1900), 84 N. W. 638; Manhattan Stamping Works v. Koehler, 45 Hun (N. Y.), 150; 10 N. Y. St. R. 60; Savery v. Ingersoll, 46 Hun (N. Y.), 176; 11 N. Y. St. R. 637; Kelly v. Miles, 26 Jones & S. (N. Y.) 495; 35 N. Y. St. R. 73; 12 N. Y. Supp. 915; Freeman v. Clute, 3 Barb. (N. Y.) 424; Masterton v. Brooklyn, 7 Hill (N. Y.), 61; Willer v. Oregon R. & Nav. Co., 15 Oreg. 153; 13 Pac. 768; Anderson Elec. Co. v. Cleburne, Water, I. & L. Co. (Tex. Civ. App), 27 S. W. 504; Sabine Tram. Co. v. Jones (Tex. Civ. App.), 43 S. W. 905; Allegheny Iron Co. v. Teaford, 96 Va. 372; 31 S. E. 525; Remsey v. Holmes Elec. Prot. Co. (Wis.), 55 N. W. 291. But see Allison v. Tennessee Coal, I. & R. Co. (Tenn. Ch. App.), 46 S. W. 348, wherein it is declared that there can be no recovery for loss of profits in Tennessee unless expressly provided for in the contract. See also secs. 1396, 1410, 1517, 1518, 1539, 1672, 1673 herein.

[39] Dart v. Lambeer, 107 N. Y. 664; 14 N. E. 291; 9 Cent. 915.

[40] Harper v. Weeks, 89 Ala. 477; 8 So. 39.

he intended to carry on, upon such premises.[41] So where a contract has been broken by mere nonpayment for the part performed, though by such breach further performance may be prevented, it has been decided that there can be no recovery for loss of profits for the unperformed part in an action for such breach.[42] So also, in case of a breach of contract to deliver a smokestack and boiler for a steamer by a specified time, profits which might have been earned by the steamer during a portion of the time when she would have been unable to earn profits owing to the failure of another contractor to supply an engine are not recoverable.[43]

§ 1286. Interest.—Interest may, in many cases, be allowed in actions to recover damages for breach of a contract.[44] But it has been decided that interest cannot be allowed on unliquidated damages awarded in such actions,[45] unless they are such as might have been easily ascertained and computed at the time of the breach, from the facts then known to exist.[46]

§ 1287. Exemplary damages.—It is a general rule that in an action for the breach of a contract, the plaintiff is not entitled to a recovery of exemplary or vindictive damages.[47] In

[41] Kenny v. Collier, 79 Ga. 743; 8 S. E. 58.

[42] Bethel v. Salem Improv. Co., 93 Va. 354; 33 L. R. A. 602; 25 S. E. 304.

[43] Picton Iron Foundry & Mfg. Co. v. Archibald, 30 N. S. 262.

[44] Walkins v. Wassell, 20 Ark. 410; Healy v. Fallon, 69 Conn. 228; 37 Atl. 495; Jones v. Mallory, 22 Conn. 386; Vierling v. Iroquois Furnace Co., 68 Ill. App. 643, aff'd 170 Ill. 189; 48 N. E. 1069; Murray v. Doud, 167 Ill. 368; 47 N. E. 717, aff'g 63 Ill. App. 247; M'Connell v. Thomas, 3 Ill. 313; Rogers v. West, 9 Ind. 400; Missouri, K. & T. Ry. Co. v. Truskett (Ind. T. 1899), 53 S. W. 444; Guthrie v. Wickliffs, 4 Bibb (Ky.), 541; Porter v. Barrow, 3 La. Ann. 140; Huston v. De Zeng, 78 Mo. App. 522; 2 Mo. A. Repr. 292; McCormack v. Lynch, 69 Mo. App. 524; Com. v. Press Co., 156 Pa. St. 516; 26 Atl. 1035; 32 W. N. C. 561; Allen v. Murray, 87 Wis. 411; 57 N. W. 979. This subject is more fully and particularly considered in the chapters upon the various subjects throughout this work, in which the question of the allowance of interest has arisen.

[45] Delafield v. Westfield, 41 App. Div. (N. Y.) 24; 58 N. Y. Supp. 277; Button v. Kinnitz, 88 Hun (N. Y.), 35; 34 N. Y. Supp. 522; Doctor v. Darling, 68 Hun (N. Y.), 70; 52 N. Y. St. R. 221; 22 N. Y. Supp. 594.

[46] Sloan v. Baird, 12 App. Div. (N. Y.) 481; 42 N. Y. Supp. 38.

[47] Toledo, W. & W. Ry. Co. v. Roberts, 71 Ill. 540; Ryder v. Thayer, 3 La. Ann. 149; Lane v. Wilcox, 55

this class of actions the evidence is limited to such as may show the breach complained of with the exceptions of actions for breach of promise of marriage, which stand in a class by themselves.

§ 1288. Duty to lessen damages—Mitigation of.—If in the case of a breach of contract the person injured can save himself from a loss arising therefrom at a trifling expense or with reasonable exertion, it is his duty to do so and he can only recover damages for such losses resulting from a breach as could not have been prevented by reasonable exertions or care.[48] So in an action for breach of contract of employment of a person as a school-teacher, by discharging him, the defendant may show that he could have obtained like employment in the vicinity by reasonable exertion.[49] But where a debtor, with the consent of his creditors, agreed to transfer his stock of goods to a third person who in consideration of such transfer was to furnish him with a certain sum of money which the creditors agreed to accept in satisfaction of their claims, it was held that in case of a breach of the agreement to furnish such money, the debtor was not obliged to endeavor to procure some one else to enter into a similar arrangement.[50] And generally, in the case of a breach of a contract, a party need not endeavor to obtain some one else to do what the other party to the contract has agreed to do.[51] So he is not required to do work which the party breaking the contract has undertaken to do.[52] And where a contract has been broken by one of the parties thereto, the other party is not bound to use diligence to ascertain the existence of a condition by

Barb. (N. Y.) 615; Duche v. Wilson, 37 Hun (N. Y.), 519; Hoy v. Gronoble, 34 Pa. St. 9; 75 Am. Dec. 628; Houston & T. C. R. R. Co. v. Shirley, 54 Tex. 125; Gordon v. Brewster, 7 Wis. 355; Bain v. Fothergill, L. R. 7 H. L. 158. But see Rose v. Beatie, 2 N. & McC. (S. C.) 538.

[48] Yellow Poplar Lumber Co. v. Chapman (C. C. App. 4th C.), 74 Fed. 444; 42 U. S. App. 21; 20 C. C. A. 503; Dalbeattie Steamship Co. v. Card (D. C. E. D. S. C.), 59 Fed. 159; Hodges v. Fires (Fla.), 15 So. 682; Loomer v. Thomas (Neb.), 56 N. W. 973; Dillon v. Anderson, 43 N. Y. 231; Worth v. Edmonds, 52 Barb. (N. Y.) 40; Gillis v. Space, 63 Barb. (N. Y.) 177.

[49] Gillis v. Space, 63 Barb. (N. Y.) 177.

[50] Banewur v. Levenson, 171 Mass. 1; 50 N. E. 10.

[51] Gulf, C. & S. F. R. Co. v. Hodge (Tex. Civ. App.), 30 S. W. 829.

[52] Indiana, B. & W. R. Co. v. Adamson (Ind.), 15 N. E. 5; 12 West. 708.

means of which he may reduce the damages resulting from the breach, unless he is aware of such facts as would put a prudent man upon inquiry as to such condition.[53] Again, where a material man fails to supply materials as contracted for a building being erected and the owner is obliged to obtain materials from some other source, he is only bound to use reasonable care, considering the condition of the work and the necessity of such materials to get them as cheaply as possible.[54]

§ 1289. Partial breach of contract—Expenses.—A party may not be liable as for a total breach of a contract where there has been a violation of a part only of such contract.[55] And where plaintiff has been prevented through the fault of the defendant from completing the contract, his measure of damages will not be the price agreed to be paid for full performance, but he will be entitled to compensation for the part performed and indemnity for his loss in respect to the part unperformed.[56] And in an action upon a commutative contract which has been partially performed by the plaintiff, his measure of recovery will be the benefit derived by the defendant from such partial performance and not the contract price.[57] So also, in case of part performance by one party to a contract which has been broken by the other party thereto, reasonable expenditures properly made in order to perform are in some cases recoverable, and if such expenditures are unreasonable, it is the duty of the other party to show it.[58] And it has been decided that where it is incompetent to give opinion evidence to establish the amount of damages for failure to complete a contract, they may be assessed at such reasonable sum as in the judgment of the court or jury the evidence warrants.[59]

§ 1290. Where third person induces breach.—Where the

[53] Waco Artesian Water Co. v. Canble, 19 Tex. Civ. App. 417; 1 Jour. of App. 93; 47 S. W. 538.

[54] Indianapolis Terra Cotta Co. v. Murphy, 99 Iowa, 633; 68 N. W. 898.

[55] Spades v. Murray, 2 Ind. App. 401; 28 N. E. 709.

[56] Friedlander v. Pugh, 43 Miss. 111; 5 Am. Rep. 478.

[57] Taylor v. Almada, 50 La. Ann. 367; 23 So. 365.

[58] Taylor Mfg. Co. v. Hatcher, 39 Fed. 440; 3 L. R. A. 587; Ga. Code, sec. 2950.

[59] First Nat. Bank v. St. Cloud, 73 Minn. 219; 75 N. W. 1054.

owner of property makes a contract to sell the same but is induced by a third person to break such contract and sell it to him, if the latter is guilty of no fraud or misrepresentation he will incur no liability to the contemplated vendee by the former contract, but such vendee may recover from the owner for the breach.[60] But where a third person induces a party to break a contract with another for the purpose of injuring the latter's business or for some other wrongful or malicious motive, he will be liable in damages therefor notwithstanding the remedy for breach of contract against the person who has broken it.[61] And where such an act is done in pursuance of a conspiracy to injure or ruin a person's business, punitive damages may be awarded.[62]

§ 1291. By stranger to contract.—Damages are not recoverable for a breach of a contract by a third person who is a stranger thereto, though such contract be made for his benefit or he otherwise derive some incidental advantage therefrom,[63] unless it appear that some obligation or duty was owing to him by the promisee.[64]

§ 1292. Partners—Recovery after death of one—Firm asset.—Where a partnership enters into a contract, a recovery, after the death of one of the partners, by the surviving partner or partners, of damages for a breach occurring before such death, constitute a firm or partnership asset, though the action was not begun until after the death had occurred.[65]

§ 1293. Where action in tort but founded on contract.—The measure of damages in an action sounding in tort but

[60] Ashley v. Dixon, 48 N. Y. 430; 8 Am. Rep. 559.

[61] Moody v. Baker, 5 Cow. (N. Y.) 351; Exchange Teleg. Co. v. Gregory (C. A.) [1896], 1 Q. B. 147; 65 L. J. Q. B. N. S. 202; 74 Law T. Rep. 83, aff'g 73 Law T. Rep. 120. But see Crain v. Petrie, 6 Hill (N. Y.), 522.

[62] Doremus v. Hennessy, 62 Ill. App. 391; 28 Chic. L. N. 199; 1 Chic. L. J. Wkly. 7.

[63] Crandall v. Payne, 154 Ill. 627; 39 N. E. 601, aff'g 54 Ill. App. 644; Embler v. Hartford Steam Boiler Insp. & Ins. Co., 158 N. Y. 431; 44 L. R. A. 512; 53 N. E. 212, aff'g 8 App. Div. (N. Y.) 186; 40 N. Y. Supp. 450; Picard v. Lang, 3 App. Div. (N. Y.) 51; 38 N. Y. Supp. 229; 73 N. Y. St. R. 846.

[64] Embler v. Hartford Steam Boiler Insp. & Ins. Co., 158 N. Y. 431; 44 L. R. A. 512; 53 N. E. 212, aff'g 8 App. Div. (N. Y.) 186; 40 N. Y. Supp. 450.

[65] Maynard v. Richards, 166 Ill. 466; 46 N. E. 1138, aff'g 61 Ill. App. 336.

founded or based on a breach of contract, is in general the same as if the action were for the breach of contract where there is no evidence showing evil intent, oppression or wanton disregard of another's rights justifying an award of increased damages.[66]

§ 1294. Pleading.—In an action for breach of contract the complaint should allege that the plaintiff has sustained damages as a result thereof, a mere allegation of a breach of contract not sufficiently alleging facts necessary to constitute a cause of action therefor.[67] But a complaint which states a contract and alleges a breach of the same and damages directly resulting therefrom is sufficient, though it does not show the particular manner in which the damages occurred.[68] And in an action for breach of a contract for the collection of fifty-four notes given to defendant for such purpose, a complaint alleging the delivery of such notes to the defendant, that twenty-eight were returned, that defendant refused to state whether any part of them had been collected or any attempts made to collect the same; that he did not return the other notes and refused to account for them or state whether any steps had been made to collect them, and that plaintiff had been damaged in a specified amount, was held to show a breach of contract, and that, though there was no allegation of value or of the solvency of the makers, plaintiff had shown a right to recover nominal damages.[69] So, also, under a code provision which authorizes the recovery of necessary expenses incurred in complying with a contract,[70] it has been held that a complaint is good in substance which alleges a breach of a contract, that certain expenses were incurred, and which states certain facts from which it may be fairly inferred that such expenses were necessarily incurred, but if such complaint is demurred to for failure to itemize expenses, it should be amended so as to give reasonable notice of the substantial particulars constituting the claim.[71] Again, where

[66] Fererro v. Western Un. Teleg. Co., 24 Wash. L. Rep. 790; 9 App. D. C. 455; 35 L. R. A. 548; Webster v. Woolford, 81 Md. 629; 32 Atl. 319.

[67] McLellan v. Goodwin, 43 App. Div. (N. Y.) 148; 59 N. Y. Supp. 290.

[68] Johnson v. Gilmore (S. D.), 60 N. W. 1070.

[69] Stevens v. Rogers, 16 Utah, 105; 51 Pac. 261.

[70] Ga. Code, sec. 2950.

[71] Fontaine v. Bayley (Ga.), 17 S. E. 1015.

a complaint specifically itemizes the breaches complained of and alleges that by reason of such specific breaches plaintiff has been damaged in a stated amount, but contains no general allegation of damages, there can only be a recovery of the particular damages claimed, and there can be no recovery of prospective damages in the absence of a specific allegation of the same.[72] In Arizona, it has been held that in an action at law there may be a joinder in a complaint of a prayer for damages for breach of a contract with a prayer for the reformation of such contract.[73]

§ 1295. Notice of claim for damages must be reasonable —Statute.—A frequent provision in contracts is that notice of any claim for damages by reason of a breach thereof shall be given within a certain time, as a condition precedent to a right of action for such breach. In this connection it has been decided that a statutory provision that no stipulation in a contract requiring such notice shall be valid unless it is reasonable, and that any stipulation shall be void which fixes the time for giving such notice at less than ninety days is valid.[74]

[72] Rathbone, Hair & Ridgeway Co. v. Wheelihan (Minn.), 84 N. W. 638.

[73] Pringle v. Hall (Ariz.), 56 Pac. 740.

[74] Burgess v. Western Union Teleg. Co., 92 Tex. 125; 46 S. W. 794, modifying 43 S. W. 1033.

CHAPTER LII.

LIQUIDATED DAMAGES AND PENALTY.

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§ 1296. Liquidated damages or penalty—Generally.—Parties may, by a valid and enforceable agreement, liquidate the

damages which are recoverable by either of them for a breach by the other of a covenant or contract.[1] So it is said, "There are great numbers of cases where, from the nature of the contract and the subject-matter of the stipulation for the breach of which the sum is provided, it is apparent to the court that the actual damages for a breach are uncertain, in their nature difficult to be ascertained or impossible to be estimated with certainty by reference to any pecuniary standard, and where the parties themselves are more intimately acquainted with all the peculiar circumstances and, therefore, better able to compute the actual or probable damages than courts or juries from any evidence which can be brought before them. In all such cases the law permits the parties to ascertain for themselves and to provide in the contract itself the amount of the damages which shall be paid for the breach. In permitting this the law does not lose sight of the principle of compensation which is the law of the contract, but merely adopts the computation or estimate of the damages made by the parties as being the best and most certain mode of ascertaining the actual damage or what sum will amount to a just compensation."[2] Much difficulty, however, has arisen in determining whether a sum named by the parties shall be considered as liquidated damages or penalty. Many considerations may arise which will cause such sum to be regarded as the latter rather than as the former, for it is not the purpose of the law to inflict upon a person for a mere breach of a contract what might be considered as a punishment.

§ 1297. Elements generally to be considered.—Equity is said to lie at the foundation of relief in the case of forfeitures and penalties,[3] and no general rule exists which will govern in all cases as to distinguishing a penalty from liquidated damages.[4] What might be determinative of the question in one case may not be of any aid in another, and it can only be generally stated, that in order to determine whether a sum named shall

[1] Taul v. Everett, 4 J. J. Marsh. (Ky.) 10; Irwin v. Tanner, 1 Mo. 210; Leggett v. Unit. L. I. Co., 64 Barb. (N. Y.) 34.

[2] Jaquith v. Hudson, 5 Mich. 137, per Christiancy, J.

[3] Streeper v. Williams, 48 Pa. St. 450.

[4] Gower v. Saltmarsh, 11 Mo. 271; Streeper v. Williams 48 Pa. St. 450.

be considered as liquidated damages or penalty courts must look at the language of the contract, the intention of the parties to be gathered from all of its provisions, the subject of the contract and its surroundings, the ease or difficulty of ascertaining the damages recoverable for a breach, the sum designated by the parties, and from all these factors determine what view should be taken of the question in good conscience and equity.[5]

§ 1298. Where doubtful.—Where, from a consideration of all the factors which may enter into the determination of the question, whether the sum designated is liquidated damages or a penalty, it is doubtful what was intended by the parties, it not being specially declared by them to be one or the other, the courts will generally construe it as a penalty, for in such cases they will always favor the latter as against the former.[6] Thus it is said in one case, "It seems to be manifest that the general disposition of the courts in this country is to regard the sum expressed in a bond as a penalty or security for the performance of the condition and not as liquidated damages in cases where the parties have not expressly declared it to be certainly the one or the other, and, therefore, if the agreement assumes the form of a bond with condition that it shall be void upon the performance or nonperformance of an act, the prima facie presumption is that the sum of money mentioned therein is intended merely as a security and not as liquidated damages; and this presumption will stand until controlled by very strong considerations."[7] So it has been decided that the omission to designate the sum mentioned as liquidated damages or a penalty is significant but not conclusive of an intention of the parties at the time the contract was entered into to treat such sum as

[5] Clements v. Schuylkill River E. S. R. Co., 132 Pa. St. 445; 19 Atl. 274; 25 W. N. C. 383; Matthews v. Sharp, 99 Pa. St. 560; Streeper v. Williams, 48 Pa. St. 454; Jaquith v. Hudson, 5 Mich. 123; Brennan v. Clark (Neb.), 45 N. W. 472.

[6] Harris v. Miller, 11 Fed. 118; Foley v. McKeegan, 4 Iowa, 1; 66 Am. Dec. 107; Wallis v. Carpenter, 13 Allen (Mass.), 19; Fisk v. Gray, 11 Allen (Mass.), 132; Shute v. Taylor, 5 Met. (Mass.) 61; O'Keefe v. Dyer, 20 Mont. 477; 52 Pac. 196; Davis v. Gillett, 52 N. H. 126; Cheddick v. Marsh, 21 N. J. L. 463; Kelley v. Seay, 3 Okla. 527; 41 Pac. 615; Baird v. Tolliver, 6 Humph. (Tenn.) 186; 44 Am. Dec. 298.

[7] Davis v. Gillett, 52 N. H. 129, per Foster, J.

a penalty.[8] And where the intention of the parties is doubtful upon the face of the instrument, proof of extrinsic facts is admissible in order to determine their real intention.[9]

§ 1299. Intention of the parties.—It may be stated as a general proposition that the question whether a sum stipulated to be paid for the breach of a contract is to be considered as liquidated damages or a penalty depends upon the intention of the parties to be gathered not merely from the language used, but also from the surrounding circumstances.[10] In a case in New York in which the question arose whether the sum mentioned in a contract was a penalty or liquidated damages the court said: "The question whether a sum named in a contract to be paid for failure to perform shall be regarded as liquidated damages or a penalty has been frequently before the courts and has given them much trouble. The cases cannot all be harmonized and they furnish conspicuous examples of judicial efforts to make for parties wiser and more prudent contracts than they had made for themselves. Courts of law have in some cases assumed the functions of courts of equity and have relieved parties by forced and unnatural constructions from stipulations highly penal. Where an amount stipulated as liquidated damages would be grossly in excess of the actual damages, they have leaned to hold it a penalty. Where the actual damages were uncertain and difficult of ascertainment, they have leaned to hold the

[8] O'Keefe v. Dyer, 20 Mont. 477; 52 Pac. 196. See Kelly v. Seay, 3 Okla. 527; 41 Pac. 615.

[9] Shute v. Hamilton, 3 Daly (N. Y.), 462.

[10] Williams v. Green, 14 Ark. 315; Potter v. Ahrens, 110 Cal. 674; 43 Pac. 388; Ricketson v. Richardson, 19 Cal. 330; Emack v. Campbell, 27 Wash. L. Rep. 214; 14 App. D. C. 186; Sutton v. Howard, 33 Ga. 536; Butler v. Wallbaum Stone & Min. Co., 47 Ill. App. 153; Reeves v. Stipp, 91 Ill. 609; Sanford v. First Nat. Bank, 94 Iowa, 680; 63 N. W. 459; Gowen v. Gerrish, 15 Me. 273; Morse v. Rathbun, 42 Mo. 594; 97 Am. Dec. 359; Morrill v. Weeks, 70 N. H. 178; 46 Atl. 132; Brewster v. Edgerly, 13 N. H. 275; Hurd v. Dunsmore, 63 N. H. 171; Kemp v. Knickerbocker Ice Co., 69 N. Y. 45, rev'g 51 How. Pr. 31; Wooster v. Kisch, 26 Hun (N. Y.), 61, aff'd 94 N. Y. 630; Dakin v. Williams, 17 Wend. (N. Y.) 447; Frank v. Block, 9 N. Y. St. R. 101; Hosmer v. True, 19 Barb. (N. Y.) 106; Knox Rock Blasting Co. v. Grafton Stone Co., 16 Ohio C. C. 21; 8 Ohio C. D. 478; Marsh v. Allabough, 103 Pa. St. 335; Durst v. Swift, 11 Tex. 273; Dullaghan v. Fitch, 42 Wis. 679. But see Jaquith v. Hudson, 5 Mich. 123.

stipulated amount to have been intended as liquidated damages. No form of words has been regarded as controlling. But the fundamental rule, as often announced, is that the construction of these stipulations depends in each case upon the intent of the parties as evinced by the entire agreement construed in the light of the circumstances under which it was made."[11] And again, in a late case in New York it was said that "the rule deducible from all the cases, is that where it is ascertainable from the terms of an agreement construed in the light of the surrounding circumstances, under which it was made, that a sum of money is agreed upon by the parties as the measure of damage which will be sustained by the nonperformance of that agreement and the sum thus agreed upon under the circumstances is not so excessive as to shock the moral sense, courts will hold the parties to their agreement and keep them bound by their contract."[12]

§ 1300. Terms and language used—Effect of.—As a general rule, if a contract in explicit terms declares that the sum mentioned shall be considered as liquidated damages, it will be enforced according to its terms in the absence of some other facts or circumstances which clearly qualifies or is at variance with such an intention.[13] But by the mere designation of a sum as "liquidated damages," the courts will not be limited to so construing it, for the whole agreement may be considered together with the subject-matter of the contract, and if it appears, as a result thereof, that it was intended as a penalty and is in its nature such, it will be so construed.[14] Again, the use of the

[11] Kemp v. Knickerbocker Ice Co., 69 N. Y. 57, 58, per Earl, J., citing Addison on Contracts, 1161; Main v. King, 10 Barb. (N. Y.) 59; Richards v. Edick, 17 Barb. (N. Y.) 266; Cotheal v. Talmadge, 9 N. Y. 551; Bagley v. Peddie, 16 N. Y. 469; Colwell v. Lawrence, 38 N. Y. 71; Noyes v. Phillips, 60 N. Y. 408; Lea v. Whitaker, 8 Com. Pleas. (L. R.) 70; Sparrow v. Paris, 7 H. & N. 594; Shute v. Taylor, 5 Met. (Mass.) 61; Lynde v. Thompson, 2 Allen (Mass.), 456.

[12] Dunn v. Morgenthau (App. Div. N. Y. 1902), 76 N. Y. Supp. 827, per Patterson, J.

[13] Harris v. Miller, 11 Fed. 122; Potter v. Ahrens, 110 Cal. 674; 43 Pac. 388; Denver Land & Security Co. v. Rosenfeld Const. Co., 19 Colo. 539; 36 Pac. 146; Leggett v. Mut. L. I. Co., 50 Barb. (N. Y.) 616; O'Donnell v. Rosenberg, 4 Daly (N. Y.), 555.

[14] Tilley v. American Bldg. & L. Assoc., 52 Fed. 618; 40 Am. & Eng. Corp. Cas. 375; White v. Arleth, Fed. Cas. No. 17,536; Watts's Exrs. v. Sheppard, 2 Ala. 425; Doane v. Chic.

word "penalty" will generally be construed as showing that the parties intended the sum mentioned to be so considered.[15] As will also the words "forfeiture" or "forfeit."[16] As to the use of such words and their effect, the following extract from the opinion in an Iowa case is pertinent: "The words used, whether 'forfeiture,' 'liquidated damages' or 'penal sum' are not alone conclusive, nor indeed is the language of the contract generally. The court will look to the nature of the contract, the situation of the parties and to all the surrounding facts and circumstances which throw light upon the intent of the parties for the purpose of determining what meaning they placed upon the words used."[17] But in the absence of any evidence to the contrary,

City R. Co., 51 Ill. App. 353; 8 Nat. Corp. Rep. 27; Kelly v. Ferjervary, 111 Iowa, 699; Sanford v. Bank, 94 Iowa, 683; Foley v. McKeegan, 4 Iowa, 1; 66 Am. Dec. 107; Condon v. Kemper, 47 Kan. 126; 13 L. R. A. 671; 27 Pac. 829; Hahn v. Horstman, 12 Bush (Ky.), 249; Perkins v. Lyman, 11 Mass. 76; 6 Am. Dec. 158; Davis v. Freeman, 10 Mich. 188; May v. Crawford, 142 Mo. 390; 44 S. W. 260; Hamaker v. Schroers, 49 Mo. 406; Basye v. Ambrose, 28 Mo. 39; Whitfield v. Levy, 35 N. J. L. 151; Wheatland v. Taylor, 29 Hun (N. Y.), 70; Shiell v. McNitt, 9 Paige (N. Y.), 101; Clements v. Schuylkill River E. S. R. Co., 132 Pa. St. 445; 19 Atl. 274; 25 W. N. C. 283; Williams v. Vance, 9 Rich. (S. C.) 344; 30 Am. Rep. 26; Yenner v. Hammond, 36 Wis. 277.

[15] White v. Arleth, Fed. Cas. No. 17,536; Lord v. Gaddis, 9 Iowa, 265; Abrams v. Counts, 4 Ohio, 214.

[16] "The term forfeiture imports a penalty; it has no necessary or natural connection with the measure of degree of injury which may result from a breach of contract or from an imperfect performance. It implies an absolute infliction, regardless of the nature and extent of the causes by which it is superinduced. Unless, therefore, it shall have been expressly adopted and declared by the parties to be a measure of injury or compensation, it is never taken as such by the courts of justice who leave it to be enforced where this can be done in its real character, viz: that of a penalty." Van Buren v. Diggs, 11 How. (U. S.) 477; 13 L. Ed. 778, per Mr. Justice Daniel. See also Nichols v. Haines, 98 Fed. 692; 39 C. C. A. 235; Smith v. United States, 34 Ct. Cl. 472; Coggshall v. Steele, 22 Wkly. Dig. (N. Y.) 537; Laurea v. Bernauer, 33 Hun (N. Y.), 307; Saltus v. Ralph, 15 Abb. Pr. (N. Y.) 273. But see Eakin v. Scott, 70 Tex. 442; 7 S. W. 777, wherein the word "ferfeiture" is construed to mean liquidated damages. In Cheddick v. Marsh, 21 N. J. L. 463, it was held that a provision "to forfeit and pay" a designated sum should be construed as liquidated damages.

[17] Sanford v. First. Nat. Bank, 94 Iowa, 683; 63 N. W. 459, per Deemer, J. In support of the language used in this opinion as cited in text, see also Pierce v. Fuller, 8 Mass. 223; May v. Crawford, 150 Mo. 504; 51 S. W. 693; Noble v. Noble, 7 Cow. (N.

the usual technical meaning will be accorded to the words "penalty" or "liquidated damages" and the burden is upon the party claiming another meaning, than that to be inferred from the words used, to show that such was intended.[18] And where a sum is designated as a penalty on a contract, it will not be construed as liquidated damages in the absence of some strong evidence that such was the intention of the parties.[19] In this connection it is said in a Massachusetts case:[20] "There is no doubt that a sum which is to be paid upon the breach of a primary undertaking may be treated as a penalty in some cases, notwithstanding the fact that it is called "liquidated damages" in the contract. The typical case is where it secures several promises of varying importance, one or more of which is for the payment of a much smaller sum of money.[21] But we heartily agree with the court of appeals in England that so far as precedent permits, the proper course is to enforce contracts according to their plain meaning and not to undertake to be wiser than the parties, and, therefore, that in general, when parties say that a sum is payable as liquidated damages, they will be taken to mean what they say and be held to their word."[22]

§ 1301. Where damages can be ascertained.—The question whether the actual damages which result from the breach of a contract can be ascertained and measured is an important factor in determining whether a sum named in a contract is a penalty or is liquidated damages. As a general rule independent of any other controlling factor though a sum may be designated as liquidated damages if it appear that the actual damages from a breach of the contract can be computed, then such sum will be

Y.) 307; Sainter v. Fergason, 7 M. G. & S. 716; Jones v. Green, 3 Y. & Jer. 299; Fletcher v. Dycke, 2 T. R. 32.

[18] Kelly v. Ferjervary, 111 Iowa, 699; 83 N. W. 791. See also Esmond v. Van Benschoten, 12 Barb. (N. Y.) 366; Brinkerhoff v. Olp, 35 Barb. (N. Y.) 27.

[19] Smith v. Brown, 164 Mass. 584; 42 N. E. 101. See also Colwell v. Lawrence, 38 N. Y. 71; Dennis v. Cummins, 3 Johns. Cas. (N. Y.) 297; Hoag v. McGinnis, 22 Wend. (N. Y.) 163; Mill v. Fox, 4 Ed. Sm. (N. Y.) 220; Saltus v. Ralph, 15 Abb. Pr. (N. Y.) 273.

[20] Guerin v. Stacy, 175 Mass. 596; 56 N. E. 892, per Holmes, C. J.

[21] Citing Fisk v. Gray, 11 Allen (Mass.), 132; Wallis v. Smith, 21 Ch. Div. 243, 257, 268, 275.

[22] Wallis v. Smith, 21 Ch. Div. 243; Atkyns v. Kinner, 4 Exch. 776, 783.

considered as a penalty, and actual damages only are recoverable.[23]

§ 1302. Where damages difficult of ascertainment.—Where the damages which may result from the nonperformance of a contract are uncertain and cannot be admeasured with any degree of accuracy then the sum agreed to be paid by the party in default will be generally regarded as liquidated damages.[24] So it is said, "If it may appear that the damages and loss which may be presumed to result from nonperformance are uncertain and incapable of exact ascertainment, then the payment or liability fixed by them must be deemed to be liquidated damages and recoverable as such."[25] "When damages are to be sustained by the breach of a single stipulation and they are uncertain in amount and not readily susceptible of proof under the rules of evidence, then if the parties have agreed upon a sum as the measure of compensation for the breach and that sum is not disproportionate to the presumable loss, it may be recovered as

[23] Davis v. United States, 17 Ct. Cl. 201; White v. Arleth, Fed. Cas. No. 17,536; Stewart v. Grier, 7 Houst. (Del.) 378; 32 Atl. 328; Lee v. Overstreet, 44 Ga. 507; North & S. Rolling Stock Co. v. O'Hara, 73 Ill. App. 691; Tiernan v. Hinman, 16 Ill. 400; St. Louis & S. F. Ry. Co. v. Shoemaker, 27 Kan. 677; Hahn v. Horstman, 12 Bush (Ky.), 249; Fitzpatrick v. Cottingham, 14 Wis. 219.

[24] Charleston Fruit Co. v. Bond, 26 Fed. 18; United States v. Hatch, Fed. Cas. No. 15,325; Watts v. Sheppard, 2 Ala. 425; McCauley v. Brooks, 16 Cal. 11; Burk v. Dunn, 55 Ill. App. 25; Studebaker v. White, 31 Ind. 211; 99 Am. Dec. 628; Brown v. Maulsby, 17 Ind. 10; Kelly v. Ferjervary, 111 Iowa, 697; Elizabethtown & P. R. Co. v. Geoghegan, 9 Bush (Ky.), 56; Jones v. Burford, 74 Me. 439; Dwinel v. Brown, 54 Me. 468; Garst v. Harris, 177 Mass. 72; 58 N. E. 72; Fasier v. Beard, 39 Minn. 32; 38 N. W. 755; Bright v. Rowland, 4 Miss. 398; Wallis Iron Works v. Monmouth Park Assn., 55 N. J. L. 132; 19 L. R. A. 456; 26 Atl. 140; Whitfield v. Levy, 35 N. J. L. 149; Pastor v. Solomon, 25 Misc. (N. Y.) 322; 54 N. Y. Supp. 575, aff'd 26 Misc. 125; 55 N. Y. Supp. 956; Mundy v. Colver, 18 Barb. (N. Y.) 336; Mott v. Mott, 11 Barb. (N. Y.) 127; Wooster v. Kisch, 26 Hun (N. Y.), 61; Dakin v. Williams, 17 Wend. (N. Y.) 447; Shute v. Hamilton, 3 Daly (N. Y.), 462; Bagley v. Peddie, 16 N. Y. 469, rev'g 5 Sandf. 192; Cotheal v. Talmadge, 9 N. Y. 551; Waggoner v. Cox, 40 Ohio St. 539; Powell v. Burroughs, 54 Pa. St. 329; Williams v. Vance, 9 Rich. S. C. 344; 30 Am. Rep. 26; Mills v. Paul (Tex. C. A.), 30 S. W. 558; Talkin v. Anderson (Tex.), 19 S. W. 852; Krutz v. Robbins, 12 Wash. 7; 40 Pac. 415; 28 L. R. A. 676.

[25] Ward v. Hudson River Bldg. Co., 125 N. Y. 235; 26 N. E. 258, per Gray, J.

liquidated damages."[26] So though a sum is designated by the parties as a "penalty," it may be treated as liquidated damages where there is a manifest difficulty in ascertaining the actual damages sustained.[27] Again, this rule has been applied in the case of a contract between the manufacturer of a patent medicine and the purchaser of the same in which it was provided that the purchaser should be liable in a designated sum as stipulated damages in case he sold such medicine for less than a certain price, and it appeared that the actual damages were difficult of ascertainment.[28]

§ 1303. Where sum disproportionate to actual damage.—If the sum designated is a reasonable compensation for the actual damage sustained, it will generally be regarded as liquidated damages, but if it appears that the amount is such that it violates the fundamental rule of compensation which is the basis of the recovery of damages, and is materially in excess of what would fairly compensate the injured party, then it will be construed as a penalty.[29] And where a contract provides for the performance of several acts, and the sum expressed would in one event be too small and in another too large, it has been decided that such sum should be considered as a penalty and not as liquidated damages.[30]

§ 1304. Same subject continued.—The rule stated in the preceding section has been applied in the case of notes which provide for the payment of a designated sum upon failure to

[26] Wallis Iron Work v. Monmouth Park Assn., 55 N. J. L. 132; 26 Atl. 143, per Dixon, J.

[27] Pastor v. Solomon, 25 Misc. (N. Y.) 322; 54 N. Y. Supp. 575, aff'd 26 Misc. (N. Y.) 125; 55 N. Y. Supp. 956.

[28] Garst v. Harris, 177 Mass. 72; 58 N. E. 174.

[29] Davis v. United States, 17 Ct. Cl. 201; Nash v. Hermosilla, 9 Cal. 584; 70 Am. Dec. 676; Doane v. Chic. City Ry. Co., 51 Ill. App. 353; Bolster v. Post, 57 Iowa, 698; 11 N. W. 637; Condon v. Kemper, 47 Kan. 126; 27 Pac. 829; 13 L. R. A. 671; Louisville Water Co. v. Youngstown Bridge Co., 16 Ky. Law Rep. 350; Stearns v. Barrett, 1 Pick. (Mass.) 443; 11 Am. Dec. 223; Gower v. Saltmarsh, 11 Mo. 271; Gillilan v. Rollins, 41 Neb. 540; 59 N. W. 893; Greer v. Tweed, 13 Abb. Prac. N. S. (N. Y.) 427; Bradstreet v. Baker, 14 R. I. 546; Baird v. Tolliver, 6 Humph. (Tenn.) 186; 44 Am. Dec. 298.

[30] Watts's Exr. v. Sheppard, 2 Ala. 425; Lampman v. Cochran, 16 N. Y. 275; Ward v. Jewett, 4 Rob. (N. Y.) 714. Compare Clement v. Cash, 21 N. Y. 253.

pay the note when due, such sum being in excess of the amount due on the note.[31] And likewise where parties agree upon the price for personal property at a stated sum, but provide in the contract that upon failure to perform the contract by the purchaser a larger sum shall be payable as stipulated damages by him, it will not been forced as such.[32] So also, where in a contract for the sale of land it was provided that upon failure to pay the purchase price by a certain date or any part thereof, the contract might be declared void by the vendor who might retain such sums as had been paid and recover the balance due as unliquidated damages, it was held that upon failure to pay any portion of such price the vendor could not recover as liquidated damages the full purchase price of the property.[33] And where parties agreed to abide by the decision of referees as to the amount due to one of them, and in case of the failure so to do the sum of five hundred dollars should be paid by the one failing to so abide to the other, and the referees found the sum of three hundred and ten dollars to be due, it was decided that on refusal to pay such sum the amount designated as liquidated damages could not be recovered, but the recovery would be limited to the amount found due.[34] Again, where the sum of five hundred dollars was designated as "liquidated and ascertained damages for the breach" of a contract to do certain work, the cost of which would not exceed one hundred dollars, it was held that the sum mentioned should be considered as a penalty.[35]

§ 1305. Contract with several provisions—For breach of some, damages ascertainable.—Where a contract contains sev-

[31] Hughes v. Fisher, 1 Miss. 516. Where a note is for a certain sum with a provision that it may be discharged by payment of a less sum by a certain day, the greater sum has in Alabama been held not to be a penalty but the debt which is in fact due. Carter v. Corley, 23 Ala. 612; Compare Longworth v. Askren, 15 Ohio St. 68.

[32] Haldeman v. Jennings, 14 Ark. 329. In this case it appeared that the property was staves for which the purchaser agreed to pay $400, and the contract provided that in case of failure to fulfill the contract of purchase, $500 should become due as stipulated damages.

[33] Scofield v. Tompkins, 95 Ill. 190; 35 Am. Rep. 160.

[34] Gray v. Crosby, 18 Johns. (N. Y.) 219. See Spear v. Smith, 1 Den. (N. Y.) 464.

[35] Condon v. Kemper, 47 Kan. 126; 13 L. R. A. 671; 27 Pac. 829.

eral provisions for the performance of various acts and for a breach of some of them the damages can be easily estimated while for others they are difficult or incapable of measurement by any pecuniary standard, a sum designated in the contract as payable for a breach of anyone of such stipulations will be construed as a penalty and not liquidated damages.[36]

§ 1306. Sum for each breach.—Where a contract provides that for each breach thereof a certain sum shall be payable as liquidated damages, such sum will generally be regarded as designated.[37]

§ 1307. One sum in contract to perform several acts.—Where in a contract which provides for the performance of several acts of different degrees of importance there is a stipulation that one designated sum shall be paid in case of a breach of the contract, and the actual damages for part or all of the breaches can be computed, and the sum designated would be excessive for any of the breaches, such sum, will be regarded as a penalty and not as liquidated damages.[38] One of the leading

[36] Charleston Fruit Co. v. Bond, 26 Fed. 18; McPherson v. Robertson, 82 Ala. 459; 2 So. 333; Trower v. Elder, 77 Ill. 452; Carpenter v. Lockhart, 1 Ind. 434; Chase v. Allen, 13 Gray (Mass.), 42; First Orthodox Congregational Church v. Walrath, 27 Mich. 232; Long v. Towl, 42 Mo. 545; 97 Am. Dec. 355; Hammer v. Breidenbach, 31 Mo. 49; State v. Dodd, 45 N. J. L. 525; Niver v. Rossman, 18 Barb. (N. Y.) 50; Berry v. Wisdom, 3 Ohio St. 241.

[37] Dunlop v. Gregory, 10 N. Y. 241.

[38] East Moline Co. v. Weir Plow Co., 95 Fed. 250; 37 C. C. A. 62; People v. Central Pac. R. Co., 76 Cal. 29; 18 Pac. 90; Smith v. Newell, 37 Fla. 147; 20 So. 249; Carpenter v. Lockhart, 1 Ind. 434; Lord v. Gaddis, 9 Iowa, 265; Heatwole v. Gorrell, 35 Kan. 693; Heard v. Bowers, 23 Pick. (Mass.) 455; Daily v. Litchfield, 10 Mich. 29; Carter v. Strom, 41 Minn. 522; 43 N. W. 394; Monmouth Park Assn. v. Warren, 55 N. J. L. 598; 27 Atl. 932; Hoagland v. Segur, 38 N. J. L. 230; Jackson v. Baker, 2 Edw. Ch. (N. Y.) 471; Niver v. Rossman, 18 Barb. (N. Y.) 50; Beale v. Hayes, 7 N. Y. Super. Ct. 540; Berry v. Wisdom, 3 Ohio St. 241; El Reno v. Cullinane, 4 Okla. 457; 46 Pac. 510; Wilhelm v. Eaves, 21 Oreg. 194; 27 Pac. 1053; 14 L. R. A. 297; Keck v. Bieber, 148 Pa. St. 645; 24 Atl. 170; 33 Am. St. Rep. 846; Lyman v. Babcock, 40 Wis. 503; Brown v. Taggart, 10 Up. Can. Q. B. 183; Willson v. Love (C. A.), [1896] 1 Q. B. 626; 65 L. J. Q. B. N. S. 474; Davies v. Penton, 6 B. & C. 216; Beckham v. Drake, 8 M. & W. 846; Betts v. Burch, 4 H. & N. 506.

cases upon this point is the early one of Kemble v. Farren,[39] which was an action of assumpsit to recover liquidated damages. The defendant is this case had engaged himself to appear as principal comedian at plaintiff's theatre for four seasons and in all things to conform to the regulations of the theatre, and the plaintiff agreed to pay him three pounds, six shillings and six pence per night. The contract also provided that in case of failure of either to fulfill such contract or any part thereof or any stipulation therein contained, the party so failing should pay to the other the sum of one thousand pounds which was declared to be liquidated and ascertained damages and not a penalty or a penal sum or in the nature thereof. The plaintiff brought the action to recover such sum, alleging as a breach that defendant refused to act during the second season. In this it was said by Chief Justice Tindal: "It is undoubtedly difficult to suppose any words more precise and explicit than those used in the agreement; the same declaring not only affirmatively that the sum of one thousand pounds should be taken as liquidated damages but negatively also that it should not be considered as a penalty or in the nature thereof. And if the clause had been limited to breaches which were of an uncertain nature and amount, we should have thought it would have had the effect of ascertaining the damages upon any such breach at one thousand pounds, for we see nothing illegal or unreasonable in the parties by their mutual agreement settling the amount of damages uncertain in their nature at any sum upon which they may agree. But in the present case the clause is not so confined; it extends to the breach of any stipulation by either party. If, therefore, on the one hand the plaintiff had neglected to make a single payment of three pounds, six shillings and six pence per day, or on the other hand the defendant had refused to conform to any usual regulation of the theatre, however minute or unimportant, it must have been contended that the clause in question in either case would have given the stipulated damages of one thousand pounds. But that a very large sum should become immediately payable in consequence of the nonpayment of a very small sum, and that the former should not be considered as a penalty, appears

[39] 6 Bing. R. 141.

to be a contradiction in terms, the case being precisely that in which courts of equity have always relieved and against which courts of law have in modern times endeavored to relieve by directing juries to assess the real damages sustained by the breach of the agreement." So also, in another case which was an action of a similar nature upon a similar contract,[40] it was declared that "where articles contain covenants for the performance of several things and then one large sum is stated at the end to be paid upon breach of performance, that must be considered as a penalty."[41] In this last case it will be noted that no reference is made to an apparent limitation of the rule to those cases where the stipulations are of different degrees of importance, and though the rule is generally stated and cited as being so qualified, yet there are several cases which seem to sustain the rule that where articles covenant for the performance of several acts (without regard to any difference in importance), and stipulate for the payment of a sum in gross for breach of any or all such sum will be considered as a penalty, and if the parties in such cases desire to liquidate the damages, they should express the sum to be paid upon each distinct breach.[42]

§ 1308. Stipulation to pay larger sum on failure to pay lesser sum.—A provision in a contract that in default of the payment of a certain sum of money a designated sum much in excess of that shall become payable or be forfeited as liquidated damages will nevertheless be construed as a penalty. In such cases the measure of damages is generally the interest on the amount to be paid, which can be definitely ascertained, and to permit a sum named in excess of the debt to stand as liquidated damages would be to enable parties to evade the usury laws.[43]

[40] Astley v. Wedon, 2 Bos. & Pul. 346.

[41] Per Mr. Justice Heath.

[42] Watts's Exrs. v. Sheppard, 2 Ala. 425. See also Nash v. Hermosilla, 9 Cal. 584; Swift v. Crow, 17 Ga. 609; St. Louis & S. F. Ry. Co. v. Shoemaker, 27 Kan. 677; Cheddich v. Marsh, 21 N. J. L. 463.

[43] Watts v. Sheppard, 2 Ala. 425; Browne v. Steck, 2 Colo. 70; Clark v. Kay, 26 Ga. 403; Goodyear Shoe Co. v. Selz, Schwab & Co., 157 Ill. 186; 41 N. E. 625; Bryton v. Marston, 33 Ill. App. 211; Kuhn v. Myers, 37 Iowa, 351; Kurtz v. Sponable, 6 Kan. 395; Hough v. Kugler, 36 Md. 186; Fisk v. Gray, 11 Allen (Mass.), 132; Hughes v. Fisher, 1 Miss. 516; Ward v. Jewett, 27 N. Y. Super. Ct. 714;

And a similar rule prevails where one by contract agrees to do several things in addition to the payment of a sum of money and for failure to perform any of the obligations imposed to pay a larger sum as liquidated damages.[44] This question arose in a recent case in New Hampshire,[45] in which it appeared that partners had in a partnership agreement provided that "in case of failure to perform all the conditions herein named or any default in payment of any moneys due from one party to the other where a demand for same has been made by either party, the defaulting party agrees to forfeit the sum of three hundred dollars to the party so injured, which amount is hereby fixed and liquidated as the amount of damages to be paid by the failing party to the other." This provision was construed as a penalty, and the court said: "The intention of the parties is generally the test to determine whether a promise to pay a fixed sum of money for any default in the performance of a contract is in the nature of a penalty or of liquidated damages.[46] But a promise to pay a larger sum of money in the event of a default in the payment of a much smaller sum is an exception to this rule, for the law makes interest the measure of damages for failure to pay money when it is due, and will not permit parties to avoid the usury laws in this way. Such a promise will be treated as a penalty and not as liquidated damages."[47]

§ 1309. Sum for performance of collateral agreement.— Where a sum of money is mentioned in a contract merely to secure the enjoyment of some collateral object, the latter will be considered as the principal intent of the contract, and the sum mentioned merely an accessory in the nature of a penalty to secure the damages actually sustained, and it is incumbent upon

Niver v. Rossman, 18 Barb. (N. Y.) 50; Cairness v. Knight, 17 Ohio St. 68; Schofield v. Preston, 40 Leg. Int. (Pa.) 140; Sessions v. Richmond, 1 R. I. 298; Krutz v. Robbins, 12 Wash. 7; 40 Pac. 415; Fitzpatrick v. Cottingham, 14 Wis. 237.

[44] Bryton v. Marston, 33 Ill. App. 211.

[45] Morrill v. Weeks, 70 N. H. 178; 46 Atl. 32.

[46] Citing Hurd v. Dunsmore, 63 N. H. 171; Houghton v. Pattee, 58 N. H. 326; Davis v. Gillett, 52 N. H. 126; Mead v. Wheeler, 13 N. H. 351; Brewster v. Edgerly, 13 N. H. 275; Chamberlain v. Bagley, 11 N. H. 234.

[47] Per Young, J.

the party desiring to recover the sum named to show that it was so intended by the contracting parties.[48]

§ 1310. Alternative obligation to perform or pay sum specified.—Where the obligation of a contract is an alternative one, the option being given thereby either to perform some specified act on or before a certain day, or in case of failure to perform by date named, then to pay a certain sum of money, such sum is not in the nature of a penalty but in case of a breach of performance, there may be a recovery of the stipulated amount.[49] Thus it was so held where the purchaser of real estate, in consideration of the purchase price being only a certain sum, agreed to build two houses on the land or forfeit a specified sum.[50] And likewise where a party agreed to pay a certain price for stock in case he did not return the same by a specified day.[51] So, again, where the defendant had agreed to deliver the deeds and search to the property within three months or pay to the said second party (the plaintiff), the sum of thirteen hundred dollars in lieu thereof, and he refused to fulfill the contract for the sale of such land by delivery of the necessary papers, it was held that this was not a provision for a penalty but liquidated damages.[52]

§ 1311. Forfeiture of deposit.—In many cases at the time of the execution of a contract, deposits are made by the parties thereto subject to the provision that such deposit or deposits shall be forfeited by either party, who may subsequently fail to carry out the provisions of such contract. In such cases the question whether the deposit is to be considered as a penalty or as liquidated damages is subject to the same general rules as control in other cases, and ordinarily where it appears to have been the intention of the parties that such sum should be

[48] O'Keefe v. Dyer, 20 Mont. 477; 52 Pac. 196; Dill v. Lawrence, 109 Ind. 564; 10 N. E. 573; Davis v. Gillett, 52 N. H. 126; Barton v. Glover, Holt, N. P. 43 note.

[49] Keeble v. Keeble, 85 Ala. 552; 5 So. 149; Pearson v. Williams, 24 Wend. (N. Y.) 244; 26 Wend. 630; Haskins v. Dern, 19 Utah, 89; 56 Pac. 953.

[50] Pearson v. Williams, 24 Wend. (N. Y.) 244; 26 Wend. 630.

[51] Haskins v. Dern, 19 Utah, 89; 56 Pac. 953.

[52] Taylor v. Smith, 24 App. Div. (N. Y.) 519; 49 N. Y. Supp. 41.

regarded as liquidated damages and the actual damages in case of a breach cannot be readily or accurately ascertained, the courts will regard such sum according to the evident intention.[53] But if it appear that the parties intended such sum to be a penalty or the actual damages can be easily ascertained or any other reason exists which would cause it to be so regarded, the courts will so construe it, in which case only actual damages are recoverable.[54] But where money is deposited by tenants to secure the performance of the conditions of a lease, such sum in case of breach to be retained as liquidated damages by the lessor, the court in determining whether such sum is to be regarded as a penalty, or as liquidated damages, should construe the instrument solely with reference to the language used and the surrounding circumstances as they existed at the time when it was executed.[55]

§ 1312. Effect of mutual failure to perform.—Where certain obligations are imposed upon both parties to a contract which provides that upon failure of the contractor to perform in conformity to the contract, the other having faithfully kept and performed all of his covenants, such failure shall be a sufficient reason for the forfeiture of a certain per cent of the contract price, even though such sum is to be treated as liquidated damages, the one for whom the work was done, his right to recover being conditioned upon his faithfully keeping and performing the covenants imposed on him, is not entitled to retain such per cent where he has failed to live up to the obligations imposed by the contract.[56]

§ 1313. Proof of actual damage not necessary where damages liquidated.—If the parties to a contract have legally liquidated the damages for a breach of the same, it is not a pre-

[53] Wilson v. Town of Jonesboro, 57 Ark. 168; 20 S. W. 1093; Sanders v. Carter, 91 Ga. 450; 17 S. E. 345; Woodbury v. Turner, Day & W. Mfg. Co., 96 Ky. 459; Chande v. Shepard, 122 N. Y. 397.

[54] Wilson v. City of Baltimore, 83 Md. 203; 34 Atl. 774; Kellogg v. Curtis, 9 Pick. (Mass.) 534; Tinkham v. Saton, 44 Mo. App. 659; Lindsey v. Rockwall County, 10 Tex. Civ. App. 225; 30 S. W. 380; Kennedy v. United States, 24 Ct. Cl. 122.

[55] Cæsar v. Rubinson (App. Div. N. Y. 1902), 75 N. Y. Supp. 546.

[56] Florida Southern R. R. Co. v. Southern Supply Co., 112 Ga. 1; 37 S. E. 130.

requisite to a recovery of the stipulated sum that proof of actual damages be given.[57] So where a lease of land for operating for oil and gas provided that on failure of the lessee to sink a second well within two years, he should pay one thousand dollars or forfeit the lease, it was held that on his failure to complete such well he could not avoid liability for this sum on the ground that the lessor sustained no damage because there was neither oil nor gas in paying quantities on such land.[58] And where under a partnership agreement one of the partners deposited five hundred dollars in the bank to be forfeited by him in case he should fail to carry out the contract, such sum was held to be liquidated damages, and it was decided that no proof of actual damages was required.[59] In this case the court said in reference to the contention that proof of actual damages was necessary: "It is also insisted that the court was in error in directing a verdict for plaintiff because there was no proof that he suffered any damage by reason of defendant's breach of contract. If the money deposited is to be treated as liquidated damages, then no such proof is required.[60] The case of Hathaway v. Lynn,[61] announcing a contrary rule, does not commend itself to our judgment."[62] And in another case it was said, "The parties having by their agreement liquidated the damages for its breach, any inquiry as to the extent of the injury sustained by the plaintiffs by the starting of defendant's store was irrelevant."[63] But in a recent case in New York it has been held that if no damage is sustained, the provision of a contract for liquidated damages will be regarded as a penalty, for it is said to be a necessary factor in the problem that damage result from the breach.[64]

[57] Stanley v. Montgomery, 102 Ind. 102; 26 N. E. 213; Sanford v. First Nat. Bank, 94 Iowa, 680; 63 N. W. 459; Louisville Water Co. v. Youngstown Bridge Co., 16 Ky. Law Rep. 350; Smith v. Coe, 33 N. Y. Super. Ct. 489; Gibson v. Oliver, 158 Pa. St. 277; 27 Atl. 961. But see Wilcus v. Kling, 87 Ill. 107; Hathaway v. Lynn, 75 Wis. 186; 43 N. W. 957; 6 L. R. A. 551.

[58] Gibson v. Oliver, 158 Pa. St. 277; 27 Atl. 961.

[59] Sanford v. First Nat. Bank, 94 Iowa, 680; 63 N. W. 459.

[60] Citing Kelso v. Reid, 145 Pa. St. 606; 23 Atl. 323; Spicer v. Hoop, 51 Ind. 365.

[61] 75 Wis. 186; 43 N. W. 956.

[62] Per Deemer, J.

[63] Kelso v. Reid, 145 Pa. St. 606; 23 Atl. 324, Per Curiam.

[64] Dunn v. Morgenthau (App. Div. N. Y. 1902), 76 N. Y. Supp. 827.

§ 1314. Interest.—Where the parties to a contract have liquidated the damages which may be recovered for a breach of the same, it has been decided that interest on the amount specified may also be recovered from the date at which such damages become due and payable.[65]

§ 1315. Set-off.—Where as a result of the failure of a contractor to complete a building within the time specified he has incurred a forfeiture or penalty, he cannot in an action to enforce a material man's lien on the building, recoup or set off half the amount of such forfeiture on the ground that the failure of the material man to comply with his contract was the cause of the delay.[66] But it has been held that in an action to recover liquidated damages, the defendant may show that part of the consideration mentioned in the contract has not been paid.[67]

§ 1316. Contracts not to engage in business.—While contracts in general restraint of trade are void, yet parties may as between themselves upon valuable consideration enter into a contract whereby one of them agrees not to engage in a certain business within certain limits or a certain time and if such contract is not so general in its scope as to interfere with the interests of the public and be contrary to public policy, it will be valid and enforceable and in such cases the parties may, in the contract, stipulate a sum which shall be payable in case of a breach thereof, and this sum will generally be regarded as liquidated damages, though not designated as such, since the damages are in this class of cases, as a general rule, uncertain.[68] If, however,

[65] Winch v. Mut. Ben. Ice Co., 86 N. Y. 619. See also Mead v. Wheeler, 13 N. H. 351. But see Hoagland v. Segur, 38 N. J. L. 230.

[66] Hall v. Carver (D. C. App.), 22 Wash. L. Rep. 290.

[67] Baker v. Connell, 1 Daly (N. Y.), 469.

[68] McMurray v. Gibson, 108 Ala. 451; 18 So. 806; Potter v. Ahrens, 110 Cal. 674; 43 Pac. 388; Streeter v. Rush, 25 Cal. 67; Newman v. Wolfson, 69 Ga. 764; Boyce v. Watson, 52 Ill. App. 361; Applegate v. Jacoby, 9 Dana (Ky.), 206; Holbrook v. Tobey, 66 Me. 410; 22 Am. Rep. 581; Cushing v. Drew, 97 Mass. 445; Jaquith v. Hudson, 5 Mich. 123; Hoagland v. Segur, 38 N. J. L. 230; Tode v. Gross, 127 N. Y. 480; 40 N. Y. St. R. 30, aff'g 22 N. Y. St. R. 818; 4 N. Y. Supp. 402; Nobles v. Bates, 7 Cow. (N. Y.) 307; Mott v. Mott, 11 Barb. (N. Y.) 127; Dakin v. Williams, 17 Wend. (N. Y.) 447; Kelso v. Reid, 145 Pa. St. 606; 23 Atl. 323; 1 Pa.

the sum designated is disproportionate to the actual damage sustained, it will be considered as a penalty rather than as liquidated damages.[69] But where the parties have liquidated their damages in case of a breach of a contract not to engage in business and the amount is reasonable, an inquiry as to the extent of the damage sustained by such a breach is irrelevant.[70]

§ 1317. Same subject—Cases.—An agreement made on the sale of the good will, stock and fixtures of a country store for about six thousand dollars, that the seller will not engage in such business within a certain radius under a penalty of one thousand dollars, is a reasonable provision for liquidated damages.[71] And where upon the dissolution of a partnership it was provided that the retiring partner should be paid in installments, the last installment to be forfeited in case he should set up business within thirty miles, it was decided that this was a provision for liquidated damages.[72] So again, where upon the sale of a cheese factory, together with the secrets for manufacturing certain kinds of cheese, the vendor agreed not to engage in the business of manufacturing or selling cheese for a period of five years, "under the penalty of five thousand dollars, which is hereby named as stipulated damages," it was held that this provision was intended to operate as a liquidation of damages, and it was so construed.[73] So, also, a provision in a contract of employment that if the employee engages in business in competition with his employer within one year after the employment terminates, the former agrees to forfeit five hundred dollars, has been enforced as providing for liquidated damages.[74]

Adv. R. 280; Stover v. Spielman, 1 Pa. Super. Ct. 526; Wilkinson v. Colby, 6 Kulp (Pa. Com. P. L.), 401; Muse v. Swayne, 2 Lea (Tenn.), 251; 31 Am. Rep. 607; Borley v. McDonald; 69 Vt. 309; 38 Atl. 60; Barry v. Harris, 49 Vt. 392; Snider v. McKelvey, 27 Ont. App. 339.

[69] Heatwole v. Gorrell, 35 Kan. 692; 12 Pac. 135; Perkins v. Lyman, 11 Mass. 76; 6 Am. Dec. 158; Wilkinson v. Colley, 164 Pa. St. 35; 30 Atl. 286; 26 L. R. A. 114; 35 Wkly. Notes Cas. 177; Moore v. Colt, 127 Pa. St. 289; 18 Atl. 24; 14 Am. St. Rep. 845; 24 Wkly. Notes Cas. 356.

[70] Kelso v. Reid, 145 Pa. St. 606; 23 Atl. 323; 1 Pa. Adv. R. 280.

[71] Kelso v. Reid, 145 Pa. St. 606; 23 Atl. 323; 1 Pa. Adv. R. 280.

[72] Nobles v. Bates, 7 Cow. (N. Y.) 307.

[73] Tode v. Gross, 127 N. Y. 480; 40 N. Y. St. R. 30, aff'g 22 N. Y. St. R. 818; 4 N. Y. Supp. 402.

[74] Borley v. McDonald, 69 Vt. 309; 38 Atl. 60.

§ 1318. In contract of employment.—A sum designated in a contract of employment, to be forfeited in case the employee leaves without giving a certain notice in advance, will be considered as liquidated damages where it is proportioned to the earning capacity of the employee, and is neither unreasonable nor oppressive. So where a contract between a cotton mill and one of its operatives, who earned between fifty cents and one dollar per day, provided that she should forfeit ten dollars of her wages if she left without giving two weeks' notice, it was held that this was a provision for liquidated damages.[75] It was said in this case: "This contract of employment on its face affords no data by which the actual damages likely to result from its nonobservance can with any certainty be ascertained. Such a circumstance has been regarded as justifying the courts in holding the sum stipulated as liquidated damages. The plaintiff in error was a cotton mill having in its employment hundreds of hands. The work is divided into many departments. . . . The evidence showed that each department is dependent upon that immediately below it. Now if the operatives of one department quit, or their work is delayed, its effect is felt in all to a greater or less degree. It is also shown that it is not always easy to replace an operative at once, and that the unexpected quitting of even one hand will to some extent affect the results throughout the mill. Yet the evidence shows that it would be impossible to calculate with any certainty the precise actual loss due to an unexpected breach of an employee's engagement. . . . The case is one then where the certainty of same damage and the uncertainty of means and standards by which the actual damage can be ascertained requires the courts to uphold the contract as one for liquidated damages, and not as providing for a penalty. The sum is certain. It is proportioned to the earning capacity of the employee, and hence presumably with regard to the particular results of a breach in each department."[76]

§ 1319. Same subject continued.—A provision in the con-

[75] Tennessee Mfg. Co. v. James, 91 Tenn. 154; 18 S. W. 262; 15 L. R. A. 211; 30 Am. St. Rep. 811.

[76] Per Lurton, J.

tract of employment of a street railway conductor that he shall receive no fares from passengers under a penalty of fifteen dollars for each violation, has been construed as providing not for a penalty but for a liquidation of the damages,[77] and a provision that a sum deposited by a conductor may be retained by the company upon report to them of any defalcation of fares by him may be so construed.[78] Again, where in a contract for the employment of a manager of a business at a salary of two thousand dollars a year for a period of ten years, it was provided that if the business should not prove successful the employer might discontinue the same and for the unexpired period of the contract should pay the employee fifteen hundred dollars per year, it was held that this was a provision for liquidated damages which might be recovered by the employee without his rendering any services in return, there being no provision as to his further employment in such event.[79] But where a contract of employment provided that if the employee abandoned his employment without notice all wages due him should be forfeited by him by way of liquidated damages, such a provision has been construed as being in the nature of a penalty, for if construed as for liquidated damages it might operate in an oppressive manner and as a punishment, since the amount of wages due would be uncertain and the employer by his own act or delay in paying cause a considerable amount to be due.[80]

§ 1320. Contracts of sale—Personalty.—Where the owner of a ship agreed to give good title and register thereof to the purchaser within a specified time under a penalty of two thousand dollars, it was held that the actual damages being uncertain, the sum would be regarded as liquidated damages.[81] And a provision in an agreement to consign a specified number of bales of cotton, that for every bale less than the stipulated number which the consignors might fail to ship, they should pay two dollars per bale as liquidated damages, was construed as

[77] Birdsall v. Twenty-Third St. Ry. Co., 8 Daly (N. Y.), 419. See Wilson v. Duls, 1 Rob. C. C. 132.

[78] Rozen v. Dry Dock E. B. & B. R. Co., 7 Misc. (N. Y.) 130; 58 N. Y. St. R. 8; 27 N. Y. Supp. 337.

[79] Glynn v. Moran, 174 Mass. 233; 54 N. E. 535; 19 Nat. Corp. Cas. 146.

[80] Schnieder v. Kingsley, 6 Misc. (N. Y.) 107; 55 N. Y. St. R. 689; 26 N. Y. Supp. 31.

[81] Fisk v. Fowler, 10 Cal. 512.

designated.[82] So, in a contract to deliver cattle by a certain date, a provision that in case of failure to deliver part or all of them a certain proportionate amount shall be paid, will be regarded as liquidated damages.[83] And in such a contract a provision that in case the purchaser fails to perform his contract a specified amount paid by him in part performance shall be retained by the seller as his "agreed and liquidated damages arising from such breach now stipulated in amount," is a stipulation for liquidated damages.[84] But where in a contract to sell and deliver a certain number of sheep it was provided that the party defaulting should forfeit to the other a certain specified sum, it was held that as the damages in such case could be easily determined, the sum would be regarded as for a penalty.[85] And where, in a contract for the purchase of a crop of oranges, then on the trees, for a certain sum, it was provided that the purchaser "is also to pay the party of the second part fifteen hundred dollars at the time of making this contract, as part payment of the entire purchase price of said fruit, and in case the said party of the first part refuses or fails to comply with the conditions of this contract, then the said payment of fifteen hundred dollars is to be forfeited" it was held that this was not a provision for liquidated damages but rather for a forfeiture.[86]

§ 1321. Contracts of sale—Realty.—Where in a contract to purchase real estate it is provided that on failure to perform a certain sum shall be paid, such provision will be construed as one for liquidated damages and not a penalty where the actual damages are uncertain.[87] And where a vendor contracts to deliver the deeds and a search of the land by a certain time, and, in case of failure, to pay a specified sum in lieu thereof on demand, this provision will be construed as one for liquidated damages, the payment of which will release him from further lia-

[82] Williams v. Vance, 9 S. C. 344; 30 Am. Rep. 26.

[83] Shelton v. Jackson, 20 Tex. Civ. App. 440; 49 S. W. 415; Frost v. Foote (Tex. Civ. App.), 44 S. W. 1071. Two dollars per head a reasonable amount. Copeland v. Holloman (Tex. Civ. App.), 51 S. W. 257.

[84] Halff v. O'Connor, 14 Tex. Civ. App. 191; 37 S. W. 238.

[85] Squires v. Elwood, 33 Neb. 126; 49 N. W. 939.

[86] Nichols v. Haines, 98 Fed. 692; 39 C. C. A. 235.

[87] Tingley v. Cutler, 7 Conn. 291.

bility on the contract.[88] So again, a stipulation to pay eight hundred dollars in case of a breach of a covenant to convey on or before a certain day, by good and sufficient title a certain piece of land, the consideration for which was five hundred dollars paid in full, has been so construed.[89] So also a stipulation will be construed as one for liquidated damages which provides that if the vendor fails to convey the land by a certain time, the purchaser shall have the use and control of such premises for a specified time as damages for failure to execute the deed.[90] And where in consideration of certain city property being conveyed for only twenty-one thousand dollars, the purchaser covenanted that he would erect houses of a certain description thereon by a specified time, and in case of default would pay the grantor four thousand dollars on demand, it was held that in case of a breach of the covenant to build, the sum specified was recoverable as liquidated damages.[91] But where it was provided in a contract for the purchase of land that if the vendor did not by a certain date furnish an abstract showing a perfect title, the purchaser, who had only paid one half the purchase money, should not be liable for the balance of such money, such provision was construed as for a penalty.[92] As was also a provision in a contract for the sale of land for forty-five thousand dollars that for each acre such land should fall short of twenty thousand acres, the grantor should pay five dollars.[93] And likewise such a construction was given to a provision in a contract of sale that if the vendees failed to pay the residue of the cash payment of twenty-five per cent of the purchase price, the latter being four hundred and ten thousand dollars within two months, there should be a forfeiture of the cash payment of five per cent of such purchase price.[94]

[88] Taylor v. Smith, 24 App. Div. (N. Y.) 519; 49 N. Y. Supp. 41.

[89] Slosson v. Beadle, 7 Johns. (N. Y.) 72. Compare McIntosh v. Johnson (Utah), 31 Pac. 450.

[90] Lorius v. Abbott, 49 Neb. 214; 68 N. W. 486.

[91] Pearson v. Williams, 24 Wend. (N. Y.) 244. See also Everett Land Co. v. Maney, 16 Wash. 552; 48 Pac. 243, citing Chase v. Allen, 13 Gray (Mass.), 42; Houghton v. Pattee, 58 N. H. 326; Noyes v. Phillips, 60 N. Y. 408; Pratt v. Carroll, 8 Cranch (U. S.), 47; 3 L. Ed. 627.

[92] Gates v. Parmly, 93 Wis. 294; 66 N. W. 253, aff'd on reh'g 67 N. W. 739.

[93] Gates v. Parmly, 93 Wis. 294; 66 N. W. 253, aff'd on reh'g 67 N. W. 739.

[94] Allison v. Cocke, 21 Ky. L. Rep. 434; 51 S. W. 593.

§ 1322. Same subject continued—Sum deposited.—Where an intending purchaser of land deposited a check for less than one tenth of the purchase price, agreeing that the sum deposited should be forfeited if he failed to carry out the agreement and take the deed, it was held that this was in the nature of stipulated damages, and where the check was lost complainant was permitted to enforce his claim in equity.[95] In this case the court said: "The rule respecting deposits by a purchaser seems to be that it is considered as a part payment of the purchase money and not a mere pledge.[96] A deposit being regarded as part payment, it follows that if the vendor seeks to recover from the defaulting purchaser damages beyond the amount deposited, the deposit must be taken into account.[97] The rule is entirely settled that a part payment of the purchase money cannot be recovered by a purchaser if he causelessly refuses to execute his contract.[98] Equity can undoubtedly relieve a purchaser who has made a deposit under certain conditions. Where the agreement for the performance of which the deposit was made, was entered into by accident or mistake, equity will relieve as in all other cases. Aside from these incidents the rule of law is the same as in equity in respect to the right to recover any or all of such deposits; and the rule is that unless it clearly appears from the contract that the amount paid or deposited is understood by the parties to be a mere pledge for the performance of the contract and not a liquidated sum to be lost in case the payor of the deposit groundlessly refuses to perform, neither will grant the defaulting party relief. If the present sum is to be regarded as stipulated damages, equity will not interfere for the purpose of relieving the purchaser.[99] The intention of the parties to regard this as a stipulated sum is manifest and the intention of the parties is said to control. This intention it is

[95] Moore v. Durnam (N. J. Ch. 1902), 51 Atl. 449.

[96] Citing 1 Sugd. Wend. ch. 1, sec. 3, par. 16.

[97] Citing Ockenden v. Henly, El. Bl. & El. 485.

[98] Citing Wood's Mayne, Dam. 245; 2 Whart. Cont. 743; Warv. Vend. 927; Hinton v. Sparkes, L. R. 3 C. P. 161; Hansbrough v. Peck, 5 Wall. (U. S.) 497; 18 L. Ed. 520; Laurence v. Miller, 86 N. Y. 132; Donahue v. Parkman, 161 Mass. 412; 37 N. E. 205; 42 Am. St. Rep. 415.

[99] Citing 1 Pom. Eq. Jur. sec. 440; 2 Story, Eq. Jur. sec. 1318.

true is to be discovered by the application of certain rules.[100] None of these rules would relieve this deposit from the character of stipulated damages, for as I have already remarked the sum deposited is not excessive nor is it to be forfeited upon the failure to perform a variety of covenants, some of a trivial character, and the damages resulting from a breach of the contract are uncertain in amount." [1]

§ 1323. Mortgage—Stipulation for attorney's fee.—Where a mortgage contains a stipulation for an attorney's fee for collection of the same, the sum specified will be considered as in the nature of a penalty rather than for liquidated damages, and the court may reduce the same in its discretion.[2]

§ 1324. Provisions in leases.—Where the lessors bind themselves to pay a certain sum upon a breach of the undertaking to secure the lessees in the possession of the premises, such sum will be considered as liquidated damages.[3] And where in a coal lease there was a guaranty of twelve hundred dollars annual royalty payable monthly, such payments to be considered as advanced royalty, it was held that the amount so guaranteed was not a mere penalty, but that the lessor might recover the full amount as liquidated damages.[4] But a sum deposited as security for the performance by the lessee of the covenants of the lease has been treated as a penalty, and where the lessee was dispossessed for nonpayment of rent, it has been decided that the lessor could only recover his actual damages.[5] So where a lease provided for the payment of five thousand dollars as liquidated damages and the only breach established was nonpayment of the rent, which together with all subsequently accruing rents was afterwards paid and accepted and the lease would expire in about a month, it was held that such provision

[100] Citing Monmouth Park Ass'n v. Wallis Iron Works, 55 N. J. L. 132-140; 26 Atl. 140; 19 L. R. A. 456; 39 Am. St. Rep. 626.

[1] Per Reed, V. C.

[2] Daly v. Maitland, 88 Pa. St. 384; 32 Am. Rep. 457.

[3] Engelhardt v. Batla (Tex. Civ. App.), 31 S. W. 324.

[4] Consolidated Coal Co. v. Peers, 150 Ill. 344; 37 N. E. 937.

[5] Chaude v. Shepard, 122 N. Y. 397. See also Carson v. Arvantes, 10 Colo. App. 382; 50 Pac. 1080.

should be regarded as one for a penalty.[6] And where in a lease of a farm it was provided that for every ton of hay or straw sold off the premises an additional rent per ton should be payable by way of penalty, it was held that the sum specified should be considered as a penalty where there was a substantial difference between the value of manure of hay and straw.[7]

§ 1325. Daily, weekly or monthly payments upon default to promptly perform.—Where a party stipulates for performance by a definite time and in case of failure on his part to fulfill such contract within time stipulated to pay a certain designated sum daily, weekly or monthly, if the sum is not so unreasonably large as to induce the belief that the parties never contemplated its payment and it appears to have been their intention that the sum designated should be liquidated damages, it will be so considered by the courts in those cases where the actual damages are uncertain.[8] But if it appear that the damages for the breach can be easily computed, and the sum designated is unreasonably

[6] Gay Mfg. Co. v. Camp (C. C. App. 4th C.), 65 Fed. 794; 25 U. S. App. 134; 13 C. C. A. 137, aff'd on reh'g 68 Fed. 67.

[7] Willson v. Love (C. A.), [1896] 1 Q. B. 626; 65 L. J. Q. B. N. S. 474.

[8] Jaqua v. Headington, 114 Fed. 309; Texas & St. L. R. Co. v. Rust, 19 Fed. 239; Watts's Exrs. v. Sheppard, 2 Ala. 425; Emack v. Campbell, 14 App. D. C. 186; 27 Wash. L. R. 214; Hennessy v. Metzger, 152 Ill. 505; 38 N. E. 1058; 43 Am. St. Rep. 267; Poppers v. Meager, 148 Ill. 192; 35 N. E. 805, aff'g 47 Ill. App. 593; Downey v. O'Donnell, 86 Ill. 49; Bird v. Rector, etc., of St. John's Episcopal Church (Ind.), 56 N. E. 129; Kelly v. Ferjervary (Iowa), 78 N. W. 828; Standard Button Fastening Co. v. Breed, 163 Mass. 10; 39 N. E. 346; Curtis v. Brewer, 17 Pick. (Mass.) 513; Wallis Iron Works v. Monmouth Park Assoc., 55 N. J. L. 132; 26 Atl. 140; 19 L. R. A. 456; Curtis v. Van Bergh, 161 N. Y. 47; 55 N. E. 398, rev'g 28 App. Div. (N. Y.) 622; 51 N. Y. Supp. 1140; Ward v. Hudson River Bldg. Co., 125 N. Y. 230; 34 N. Y. St. R. 934, aff'g 24 N. Y. St. R. 347; 5 N. Y. Supp. 319; O'Donnell v. Rosenberg, 4 Daly (N. Y.), 555; 14 Abb. Pr. (U. S.) 59; Reilly v. New York, 20 Wkly. Dig. (N. Y.) 130; Kunkle v. Wherry, 189 Pa. St. 198; 42 Atl. 112; 29 Pitts. L. J. N. S. 390; Malone v. City of Philadelphia, 147 Pa. St. 416; 23 Atl. 628; 29 Wkly. N. C. 451; Westerman v. Means, 12 Pa. St. 97; Worrell v. McClinaghan, 5 Strob. (S. C.) 115; Collier v. Betterton, 87 Tex. 440; 29 S. W. 467; Harris County v. Donaldson, 20 Tex. Civ. App. 9; 48 S. W. 791; Reichenbach v. Sage, 13 Wash. 364; 43 Pac. 354; Manistee Iron Works v. Shores Lumber Co., 92 Wis. 21; 65 N. W. 863; Townsend v. Toronto, H. & B. R. Co., 28 Ont. Rep. 195; Law v. Redditch Local Bd. (C. A), [1892] 1 Q. B. 127.

disproportionate to the actual loss, then the courts will generally consider such sum as in the nature of a penalty rather than as liquidated damages.[9] And they will also so construe it in a contract which provides that damages "are hereby liquidated at" a specified sum where it clearly appears that the intent of the parties was merely to guard against injurious delay.[10]

§ 1326. Same subject continued.—Where in a contract to place an engine and boiler in a barge it is provided that a certain sum per day shall be paid for each day the use of the boat is delayed by failure to perform the contract within the time stipulated, such sum, though designated as a "fine," will be construed as liquidated damages, where it is a fair equivalent for the value of the use of the boat.[11] And where the annual rental of a building is about seven thousand dollars a year, a sum of thirty dollars per day, provided for in a lease of such building for each day possession is retained after the expiration of the lease, has been held not so unreasonable as to require its being held a penalty.[12] Again, where in an agreement for the use of button sewing machines at a certain sum per thousand buttons it was provided that if the lessee should fail to keep an account of the buttons sewed, he should be required to pay the sum of five dollars per day during the period the machines were used and account not kept, the sum was held to be reasonable and not a penalty.[13] So also, for failure to complete a grand stand for a race course in time agreed, the sum of one hundred dollars per day, provided for by contract in case of such default, was regarded as liquidated damages.[14] And likewise a sum of fifty dollars per day to be regarded "as fixed, settled and liquidated damages" in case of failure to perform a contract

[9] Iroquois Furnace Co. v. Wilkin Mfg. Co., 181 Ill. 582; 54 N. E. 987, rev'g 77 Ill. App. 59; Hahn v. Horstman, 75 Ky. 249; Connelly v. Priest, 72 Mo. App. 673; Brennan v. Clark, 29 Neb. 385; 45 N. W. 472; Jennings v. Miller (Tex. Civ. App.), 32 S. W. 24; Rayner v. The Rederiaktiebolaget Condor, [1895] 2 Q. B. 289. See Greer v. Tweed, 13 Abb. Pr. N. S. (N. Y.) 427.

[10] McCann v. Albany, 11 App. Div. (N. Y.) 378; 42 N. Y. Supp. 94.

[11] Manistee Iron Works Co. v. Shores Lumber Co., 92 Wis. 21; 65 N. W. 863.

[12] Poppers v. Meager, 148 Ill. 192; 35 N. E. 805, aff'g 47 Ill. App. 593.

[13] Standard Button Fastening Co. v. Breed, 163 Mass. 10; 39 N. E. 346.

[14] Wallis Iron Works v. Monmouth

to erect a building and have it ready for occupancy and to let it to the parties to the contract for a term of years, is not a penalty but liquidated damages.[15] So again, where in a contract to grade city streets the city was authorized to retain as liquidated damages a sum for each day that the completion of the work was delayed beyond the stipulated time, it was decided that such sum would be regarded as designated.[16] But in a contract to construct a sewer, a provision that the damages in case of failure to complete in time stipulated "are hereby liquidated at" a sum of fifty dollars for each and every day, was held not to be for liquidated damages where it appeared that it was the intent of the parties merely to guard the city against injurious delay in the completion of such work.[17] And where it was provided in a charter party that all charterers' bills of lading should be signed by the captain as presented without qualification within a certain time after being loaded, or a certain sum should be paid as liquidated damages for each day's delay until the ship was totally lost or the cargo delivered, it was decided that such provision was in the nature of a penalty.[18] So also, where the rental value of a building can be easily determined, it has been held that a sum payable in case of delay will be regarded as a penalty and not as liquidated damages.[19]

§ 1327. Provision in case of delay—Generally.—In those cases where the amount of actual damages which results from a failure to complete work within the time stipulated in the contract is uncertain and incapable of exact ascertainment, a sum designated in such contract to be paid as "liquidated damages" or to be "forfeited" or "paid" will generally be considered by the courts as liquidated damages.[20] And where a contract

Park Assn., 55 N. J. L. 132; 26 Atl. 140; 19 L. R. A. 456.

[15] Curtis v. Van Bergh, 161 N. Y. 47; 55 N. E. 398, rev'g 28 App. Div. (N. Y.) 662; 51 N. Y. Supp. 1140.

[16] Reilly v. New York, 20 Wkly. Dig. (N. Y.) 130.

[17] McCann v. Albany, 11 App. Div. (N. Y.) 378; 42 N. Y. Supp. 94.

[18] Rayner v. The Rederiaktiebolaget Condor, [1895] 2 Q. B. 289.

[19] Connelly v. Priest, 72 Mo. App. 673.

[20] Wilson v. Town of Jonesboro, 57 Ark. 168; 20 S. W. 1093; Ward v. Hudson River Bldg. Co., 125 N. Y. 230; 26 N. E. 256, aff'g 52 Hun (N. Y.), 614; 5 N. Y. Supp. 319; Indianolo v. Gulf, T. & P. Ry. Co., 56 Tex. 594. See Chase v. Allen, 79 Mass. 42.

to construct part of a railroad provided that if the work did not progress to the satisfaction of the company's engineer he might annul the contract and any unpaid balance due for work should be forfeited to the company as liquidated damages, it was decided that the actual damages being uncertain, the provision for forfeiture would be construed as one for liquidated damages.[21] But if the sum mentioned as payable if the contract is not performed on time is not expressly denominated as liquidated damages, it has been held that it will be construed as a penalty.[22]

§ 1328. Damages for delay liquidated—Apportionment.—Where in a contract to complete a building by a certain time the damages have been liquidated at a certain sum for each day's delay beyond the time specified and the completion of the work within such time was prevented by the party seeking to recover the damages stipulated, though they may not be responsible for the whole delay, it has been decided in a New York case that no portion of such damages can be recovered as the liquidated damages under the contract cannot be apportioned.[23] In this case the court said: "By the uncontradicted acts of the defendants by their requests established beyond peradventure, the plaintiff refrained from doing those things which were necessary to complete his contract within the time limit. This being the case, how is it possible to hold him for a fixed sum as liquidated damages for noncompliance? But it may be said and was urged upon the argument that although this may be the condition of affairs, yet still these requests and acts of the defendants were not responsible for the whole of the delay. But in their contracts these defendants were careful explicitly and with precision to define the rights of the parties. They provided that the two hundred and fifty dollars a day was not to be a penalty but liquidated damages. There was to be no question about it. If the plaintiff delayed, he was to pay two hundred and fifty dollars a day as long as the delay continued. This was to be liquidated damages and not a penalty. The

[21] Geiger v. Western Maryland Co., 41 Md. 4; Faunce v. Burke, 16 Pa. St. 469.

[22] Kelley v. Seay, 3 Okla. 527; 41 Pac. 615.

[23] Wills v. Webster, 1 App. Div. (N. Y.) 301; 37 N. Y. Supp. 354; Compare Hutton Bros. v. Gordon, 2 Misc. (N. Y.) 267; 23 N. Y. Supp. 770.

plaintiff being under this strict obligation, how can he be held to it when by the very request of the defendant he refrained from so completing his contract as to bring himself within the limit fixed by such contract? If the specified day has passed, and has passed because of the acts of the defendants, who is to determine for how much of the delay plaintiff must pay two hundred and fifty dollars a day,—this precise fixed liquidated damage? It is manifest that when the plaintiff allowed the contract day to go by at the request of the defendants, he can only be made responsible for neglect, and cannot be held under the contract. The plaintiff being absolved from the obligation of completing the building on the 20th of September by the express action of the defendants, such obligation could not be renewed except by express contract. The plaintiff could not know when he would be held to be in default under such circumstances and where by the terms of the contract liquidated damages are to be sustained after a given day, the plaintiff is entitled to know with precision when he is laboring under such an obligation and not be required to leave it to the judgment of a jury as to what is a reasonable time. It is impossible under the contract to apportion liquidated damages. Either the liability for the liquidated damages exists or it does not. It cannot half exist and half be waived. In the case at bar there was a definite contract which was abrogated by the acts of both parties and it requires equally concerted action to breathe life into it again." [24]

§ 1329. Retention of certain per cent on work done.—A frequent provision in contracts for the performance of work such as building is that a certain per cent on the installments payable under the contract shall be retained until the final completion of the work and if not completed on time in accordance with the contract provision such sum shall be forfeited as liquidated damages, and where it appears that the actual damages in such case are uncertain and incapable of ascertainment, the sum will generally be treated as designated.[25] But if the actual damages in such a case can be computed, the sum may be treated as a penalty and the recovery limited to the actual damages.[26] And

[24] Per Van Brunt, P. J.

[25] Wolf v. Des Moines & F. D. R. Co., 64 Iowa, 380; 20 N. W. 481.

[26] Satterlee v. United States, 30 Ct. Cl. 31. See Mundy v. United States, 35 Ct. Cl. 365.

it has been decided that where the government annuls a contract, a percentage retained by it to secure the completion of the work in time will be treated as an penalty in the absence of a express declaration to the contrary.[27]

§ 1330. Provision in municipal ordinance granting franchise.—In a recent case in Minnesota a consideration of the provisions of an ordinance granting a franchise to a water company involved a discussion of the question of liquidated damages and penalty. The ordinance in question provided that in case of the suspension of a supply of good and wholesome water for a period exceeding sixty days all water rentals should be suspended, and this provision was construed as a stipulation for liquidated damages and enforced as such, although it was said that in an action between private individuals such a provision might be construed as a penalty.[28] The court in this case said: "When the nature and object of this ordinance are considered, no more appropriate case for stipulated damages can be conceived of. The object was to protect the lives, health, comfort and property of the inhabitants of the city by providing them with an ample supply of good water. The difficulty if not impossibility of either proving or recovering the actual damages in these respects in case of a failure of the water company to furnish such a supply is too apparent to require argument; and when we consider the great injuries, direct and consequential, liable to result from a default of the company for sixty days or more, it cannot be said that the stipulated damages were disproportionate to the probable actual damages. But we do not think that this ordinance should in that regard be treated as if it was an ordinary contract between private parties. . . . The business in which the water company was about to engage was one 'affected with a public interest' and hence subject to regulation in the exercise of the police power of the state. In accepting this ordinance the water company accepted it with all its terms and conditions. Hence we do not think that the ordinary rules which apply to a contract between private parties with reference to business 'not affected with a public interest'

[27] Gleason v. United States, 33 Ct. Cl. 65.

[28] State Trust Co. v. Duluth, 70 Minn. 257; 73 N. W. 249.

have any application in determining whether this provision is or is not a nonenforceable penalty." [29]

§ 1331. Provision for breach of composition between creditors.—Where in a composition between creditors it is provided that in case any one of them breaks the contract he shall pay a certain sum to the others or otherwise be liable to them, such a provision will be construed as in the nature of a penalty where the damages are such that they can be accurately estimated. "Plaintiffs contend that the contract is one for stipulated or agreed or liquidated damages, that is, that if either party broke the contract he would pay the others the amount of their claims respectively, or if they are in error in this and if the contract is only one for a penalty, still they were entitled to nominal damages and the circuit court erred in ordering a nonsuit. . . . We do not regard it as a case of liquidated damages for the special reason that the damages can be computed with certainty by an exact pecuniary standard and are susceptible of definite ascertainment. Or in other words, the plaintiff's damage is the amount they lost by defendant's breach of the contract, which, under the facts as they now appear that the debtors had assets enough to pay all their creditors in full at the time the attachment was levied and that these assets were diminished or sacrificed by a forced sale so that they did not yield enough to pay all in full, would be the whole of plaintiff's claim less what they might have realized from the debtors by the exercise of ordinary care and diligence after they learned of the attachment by the defendant." [30]

§ 1332. Sum in bond to obey injunction.—A sum payable in a bond conditioned that a person obey an injunction being payable on a single event only, that is, disobedience to the injunction, is regarded as liquidated damages and not a penalty. Thus it was so held in an action to recover one hundred pounds, the sum specified in a bond which was conditioned that the defendant should in obedience to an injunction refrain from trespassing upon certain premises or injuring the same.[31] In this

[29] Per Mitchell, J.
[30] Per Marshall, J.
[31] Strickland v. Williams (C. A.), [1899] 1 Q. B. 382; 68 L. J. Q. B. N. S. 241.

case it was said: "Is the bond a bond to secure to the plaintiff damages or is it a bond to secure obedience to the injunction? In my judgment the meaning of the bond is that if the defendant obeys the injunction he is not to have to pay one hundred pounds, but if he does not he is to pay one hundred pounds. Now the rule is that where the parties to a contract have agreed that a sum shall become payable on a single event only, such sum is to be regarded as liquidated damages; but where the sum is made payable to secure performance of several stipulations of varying degrees of importance, it is a penalty and not liquidated damages. I am of opinion that the sum agreed to be paid by this bond becomes payable on a single event only, and is therefore liquidated damages."[32]

§ 1333. Questions for court and jury.—Where a contract designates a sum which is to be paid in case of a breach thereof, the question whether such sum is to be regarded as a penalty or as liquidated damages, is one of law for the court to determine.[33] But where a contract expresses a penalty for a breach of the same, the damages recoverable can only be assessed by a jury.[34]

§ 1334. Liquidated damages or penalty—General conclusion.—We have discussed in the preceding sections in this chapter certain general principles or rules which control in determining whether a sum mentioned in a contract is to be construed as a penalty or as liquidated damages, and have also considered certain classes of contracts where this question has arisen. But as has already been stated, it is impossible to give any general rule which will control in all cases. That the parties to a contract may liquidate the damages for a breach thereof is conceded, but the difficulty arises in determining whether in the particular case the sum mentioned is to be so regarded or considered as a penalty. Generally where the intention of the parties can be ascertained it will be controlling of the question, and such intention is to be determined from the entire agree-

[32] Per Smith, L. J. See also Ray v. Beaufort, 2 Atk. 190.

[33] Smith v. Newell, 37 Fla. 147; 20 So. 249; May v. Crawford, 150 Mo. 504; 51 S. W. 693.

[34] McPherson v. Robertson, 82 Ala. 459; 2 So. 333.

ment from a consideration of the terms thereof, construed in the light of the surrounding facts and circumstances under which it was made. Courts have, however, in some cases disregarded what has seemed to be the intention of the parties to liquidate the damages and have construed the provision as one for a penalty where the sum was highly penal in its nature. It may be stated generally, however, that if it appears to have been the intention of the parties to liquidate the damages and they are such as are difficult or incapable of ascertainment or the sum mentioned is not disproportionate to the apparent actual damage, then the courts will give effect to such intention, but if the intention of the parties is not clear and the damages are capable of ascertainment or greatly disproportionate to the apparent actual damage, then the sum mentioned will generally be regarded as a penalty. And in this connection it should be borne in mind that the courts in case of doubt will regard the sum as a penalty rather than as liquidated damages.

CHAPTER LIII.

PARTICULAR CONTRACTS.

§ 1335. Particular contracts—Generally.
1336. Adoption—Contract for.
1337. Advertisement—Contract to publish.
1338. Arbitration — Agreement to submit to.
1339. Board and lodging—Contract for.
1340. Board of horses — Contract for.
1341. Business—Contracts not to engage in.
1342. Business — Donation to secure removal of.
1343. Caterer—Contract to furnish dinners.
1344. Copartnership—Delay in carrying out agreement for.
1345. Cultivation of land on shares —Contract for.
1346. Discontinue an action and release property — Agreement as to forbearance.
1347. Gas—Failure to supply.
1348. Heating apparatus — Greenhouse.
1349. Invest money—Contract to.
1350. Licenses — Agreement by Crown to issue and renew.
1351. Literary work—Contract to publish.
1352. Loan money—Agreement to.
1353. Mails—Contract to carry.
1354. Manufacture and "vigorously push" sale.
1355. Mining contracts.
1356. News reports—Contract to furnish.
1357. Patented improvement—Use of.
1358. Payment of money—Breach of contract for.
1359. Pledged property — Agreement to redeem.
1360. Printing contracts.
1361. Profession—Agreement not to practice—Physician.
1362. Profits—Sharing of.
1363. Railroad passes — Contracts to furnish.
1364. Scholarship.
1365. Steam for power.
1366. Stock—Refusal to issue or deliver.
1367. Subscription to corporate stock.
1368. Support—Agreements as to.
1369. Theatrical contracts, lectures, games, etc.
1370. Timber—Contracts to cut, etc.
1371. Trains—Contract to stop.
1372. Transportation of excursionists.
1373. Tuition.
1374. Water power, supply, etc.
1375. Wells—Contract to bore or drill.
1376. Will — Agreement to leave property by.

§ 1335. Particular contracts—Generally.—In the preceding chapter we have noted the general principles as to the meas-

ure of damages in actions for breaches of contract. In this chapter it is our purpose to note the application of those principles to actions for breaches of particular contracts, and though they are in a nature illustrative of the general principles already noted, yet they are also classified into the particular contracts as they are thus of more value.

§ 1336. Adoption—Contract for.—One who has entered into a contract to adopt a child, will, for a breach of such contract, be liable for the value of the services rendered and expenses incurred in carrying out the child's part of the contract, but there can be no recovery for the value of the estate which the child thereby loses.[1]

§ 1337. Advertisement—Contract to publish.—Ordinarily the damages recoverable for the breach of a contract to insert an advertisement in a newspaper or magazine is the price paid for such advertisement, and generally this would probably also be the proper measure for breach of a contract to place an advertisement on bill boards or by other means to display advertising matter. So where a contract is entered into by which a person agrees to make certain payments to a publisher, and the latter in consideration thereof agrees to permit the former to furnish advertising to such amounts, and after payments in accordance with the contract the publisher refuses to publish the advertising matter tendered, the measure of damages for such breach will be the amounts paid for which defendant refused to accept advertising.[2] And for breach of an agreement to insert an advertisement of the sale of real estate in a newspaper, speculative damages are not recoverable, but the recovery will be limited to the amount paid.[3] But in a recent case in Illinois it has been decided that the measure of damages for breach of a contract to place advertisements in positions where they will be seen by a large number of people is the value of the contract, which value may be shown by the opinions of experts.[4] And in

[1] Sandham v. Grounds (C. C. App. 3d C.), 94 Fed. 83; 36 C. C. A. 103, citing Kauss v. Rohner, 172 Pa. St. 481; Graham v. Graham, 34 Pa. St. 475; 49 Am. Dec. 557, citing as overruled Jack v. McKee, 9 Pa. St. 240.

[2] Butler v. Mail & Express Pub. Co., 54 App. Div. (N. Y.) 382; 66 N. Y. Supp. 788.

[3] Eisenlohr v. Swain, 35 Pa. St. 107.

[4] Worlds Columbian Exposition v. Pasteur Chamberland Filter Co., 82

the case of a contract for a space advertisement which after partial performance the publisher refuses to complete the publication of as agreed, if the damages are capable of being ascertained by computation, interest on the amount of such damages may be allowed. Thus where in such a contract the publisher knew the sum agreed to be paid by the plaintiff for the publication, and what the latter was to receive for such advertisement from his customers, and the only fact unknown was whether the customers would pay him for the partial performance a sum proportionate to the full performance, it was held that the damages were ascertainable by computation, and that the defendant was liable for interest on such damages.[5] Where, however, a contract was made to advertise patent remedies over the name of a druggist who gave an order for such remedies, it was held that damages for breach of such agreement were speculative and could not be recovered.[6] And for breach of a contract to supply a certain amount of advertising, the space to be reserved, it may be shown in mitigation of damages that all of such space was filled by the plaintiff with advertising matter which was equally profitable to him.[7]

§ 1338. Arbitration—Agreement to submit to.—For the breach of an agreement to submit the claims of the parties to arbitration, substantial damages may, in some cases, be recovered and the plaintiff may be compensated for necessary expenses incurred in preparation for the trial before the arbitrators, such as counsel fees, taking of depositions and for loss of time and trouble in connection therewith to the extent that the results obtained from such expense and loss would not in a trial before the usual tribunals be available.[8] And where the issue is as to

Ill. App. 94, citing Meylert v. Gas Consumers Benefit Co., 26 Abb. N. C. (N. Y.) 262; Taylor v. Bradley, 39 N. Y. 129; 100 Am. Dec. 415; Schell v. Plumb, 55 N. Y. 592; Rhodes v. Baird, 16 Ohio St. 573; Erie & P. R. Co. v. Duthel, 88 Pa. 243; 32 Am. Rep. 451; Llewellyn v. Rutherford, L. R. 10 C. P. 456, distinguishing Stevens v. Yale, 113 Mich. 680; 72 N. W. 5.

[5] Clegg v. New York Newspaper Union, 72 Hun (N. Y.), 395; 25 N. Y. Supp. 565; 55 N. Y. St. R. 464.

[6] Stevens v. Yale, 113 Mich. 680; 72 N. W. 5; 4 Det. L. N. 454; 29 Chic. L. N. 428.

[7] Savage v. Med. & Surg. Assoc., 59 Mich. 400.

[8] Pond v. Harris, 113 Mass. 114.

the breach of the arbitration clause in a policy of fire insurance it has been decided that evidence as to the loss under such policy is admissible.[9]

§ 1339. Board and lodging—Contract for.—Where a person enters into a contract to take board and lodging for a certain period, but fails to take the agreed accommodations, the measure of damages will be not the agreed price, but the loss occasioned by such breach.[10] And where a person performs part of such a contract, but leaves before the expiration of the time stipulated, the measure of damages will be the profits which would have been made by the plaintiff if defendant had carried out his contract.[11] But where a person enters into a contract to pay a specified sum per week for a designated time for board and lodging, with a provision that there shall be no deduction in case of absence, the measure of damages in an action against him for the breach of such contract will be not the profits which would have been made had the contract been carried out, but the price which it was agreed should be paid.[12] And where one is furnished board under an express agreement for compensation therefor to the one furnishing the board, the law will imply a contract to pay the reasonable value of service rendered by the latter to the former in nursing her when she fell sick.[13]

§ 1340. Board of horses—Contract for.—Where one who has agreed to furnish a certain number of horses to be boarded by another, breaks such agreement, the measure of damages in an action against him therefor will be limited to the profits which plaintiff would have made had the contract been fulfilled.[14] And in an action to recover damages for failure to properly feed and care for horses in accordance with the contract, where it is shown that they were returned in a bad condition, due to

[9] Western Assn. Co. v. Hall, 120 Ala. 547; 24 So. 936; 28 Ins. L. J. 349.

[10] Strakosch v. Wray, 6 Misc. (N. Y.) 207; 56 N. Y. St. R. 697; 26 N. Y. Supp. 567; 49 Alb. L. J. 270.

[11] Lydecker v. Valentine, 71 Hun (N. Y.), 194; 54 N. Y. St. R. 73.

[12] Wilkinson v. Davies, 146 N. Y. 25; 40 N. E. 501; 64 N. Y. St. R. 883, aff'g 31 N. Y. Supp. 1135.

[13] Cates v. Gilmer (Tenn. Ch. App.), 48 S. W. 280.

[14] West v. Moser, 49 Mo. App. 201.

want of proper care and food, the burden is on the defendant to show some other cause for their bad condition.[15]

§ 1341. Business—Contracts not to engage in.—In the case of the sale of a business, contracts are frequently entered into between the seller and the buyer by which the former agrees not to engage in such business within a certain radius, district or time, and generally in such cases the damages are liquidated by the parties in their contract.[16] Where however they are not so provided for in the contract, there may be a recovery for a breach of such contract of such damages as the plaintiff may show he has sustained as a result thereof,[17] and ordinarily the plaintiff may recover for loss of his profits. So for the violation by a manufacturer of an agreement made with a jobber not to sell in certain counties, it has been decided that the utmost measure of damages recoverable by the latter will be the profits which he would have made on the sales made by the former and not profits upon the business he might reasonably have done himself.[18] And where a hotel keeper agrees with another for a valuable consideration not to run his hotel for a certain period of time, the latter may in an action for breach of such agreement recover for gains prevented as well as losses sustained, and in such case the best evidence for the purpose of proving damage will be that showing the loss of patronage resulting from the operation of defendant's hotel.[19] So also, where the purchaser of a dock agreed not to do anything which would conflict with the seller's business and knowingly rented such dock for a competing business with his, it was held that there could be a recovery for loss of profits.[20] But where a person enters into a contract not to engage in business as a member of a rival firm, the measure of damages, in an action for a breach of such contract where the breach consists only in causing the erroneous belief that he was a member of that firm, will in-

[15] Hynes v. Hickey, 109 Mich. 188; 66 N. W. 1090; 2 Det. L. N. 60.

[16] See sec. 1316 herein.

[17] Jenkins v. Temples, 39 Ga. 655; Burckhardt v. Burckhardt, 42 Ohio St. 474.

[18] Dr. Harter Medicine Co. v. Hopkins, 83 Wis. 309; 53 N. W. 501.

[19] Wittenberg v. Mollyneaux, 60 Neb. 583; 83 N. W. 842.

[20] Hitchcock v. Anthony (C. C. App. 6th C.), 83 Fed. 779; 28 C. C. A. 80; 54 U. S. App. 439.

clude only the loss to the other party occasioned by that belief and not any loss caused by the competing business independant thereof.[21] And if the evidence furnishes no data from which the actual damages may be determined, only nominal damages can be recovered.[22] Again, in the case of a verbal contract not to carry on business, the statute of limitations is said to run from the time of the first breach thereof.[23]

§ 1342. Business—Donation to secure removal of.—Where a manufacturing company in consideration of the donation of a certain sum of money agrees to remove its business to a certain place but fails to keep its agreement, the measure of damages therefor will be the amount of money donated with interest.[24]

§ 1343. Caterer—Contract to furnish dinners.—In an action by a caterer who had agreed for a gross sum to furnish dinners on a public occasion for a certain number of an organization and also to furnish, free of charge, dinners to as many musicians as might accompany such organization, where it appeared that neither in quantity nor quality were the dinners furnished in accordance with the contract and the parties agreed to the rule of damages that there might be a recovery for the reasonable value of the food actually furnished and eaten, it has been held that there may be a recovery not only for the food consumed by the members of the organization specified in the contract, but also for that consumed by the musicians.[25]

§ 1344. Copartnership—Delay in carrying out agreement for.—Where parties enter into an agreement to form a copartnership, the measure of damages for a delay in carrying out such agreement will not be the amount which the party damaged might have earned in the interval had he been disengaged and able to procure employment.[26]

[21] Daniels v. Brodie, 54 Ark. 216; 11 L. R. A. 81; 15 S. W. 467.

[22] Taylor v. Howard, 110 Ala. 468; 18 So. 311.

[23] Davis v. Brown, 98 Ky. 475; 36 S. W. 534; 17 Ky. L. Rep. 1430, aff'g on reh'g 17 Ky. L. Rep. 1428; 32 S. W. 614.

[24] Fort Wayne Elec. L. Co. v. Miller, 131 Ind. 499; 14 L. R. A. 804; 30 N. E. 23.

[25] Ponce v. Smith, 84 Me. 266; 24 Atl. 854.

[26] Rockwell Stock & L. Co. v. Castroin, 6 Colo. App. 521; 42 Pac. 180.

§ 1345. Cultivation of land on shares—Contract for.—Where a person enters into a contract whereby he is to cultivate and work the land of another for a stated share of the crops raised, the measure of damages in an action against the latter for a breach of such contract will be the value of such share less the cost of producing it and not the value of the work and materials furnished.[27] And it has been decided that in an action for the breach of such a contract to cultivate and manage a lemon orchard for a term of five years, there may be a recovery of prospective profits, based upon the value of similar orchards of a like degree of maturity.[28] In a case in Texas, however, it has been held that where performance of a contract to plow and plant land is prevented by the owner, there may be a recovery for the actual expense and loss of time incurred but not for probable profits.[29] Again, in an action for breach of such a contract, where it was claimed that owing to failure to properly cultivate and use Paris green, there had been a loss of potatoes, the testimony of a witness as to the effect of the omission of such a remedy upon plaintiff's lands was declared to be inadmissible where it did not appear either in what season or on what soil the witness's crop was raised.[30]

§ 1346. Discontinue an action and release property—Agreement as to forbearance.—Where a party agrees for a valid consideration to discontinue an action and release property from an attachment thereon, he will, for a breach of such contract and subsequent sale of the property under such proceedings, be liable for the difference between the actual value of such property and the price realized on the sale thereof.[31] But for the breach of an agreement to withdraw a suit where no actual damages are sustained only nominal damages can be recovered.[32] Again, where a debtor agreed in consideration of

[27] Bowers v. Graves & V. Co., 8 S. D. 385; 66 N. W. 931. See also Torian v. Weeks, 46 La. Ann. 1502; 16 So. 405.

[28] Shoemaker v. Acker, 116 Cal. 239; 48 Pac. 62.

[29] Letot v. Edens (Tex. Civ. App.), 49 S. W. 109.

[30] Lord v. Lord, 33 N. Y. St. R. 752; 11 N. Y. Supp. 389.

[31] Cole v. Stearns, 23 App. Div. (N. Y.) 446; 48 N. Y. Supp. 318, aff'd 162 N. Y. 637; 57 N. E. 1106.

[32] Hogan v. Riley, 13 Gray (Mass.), 515.

the forbearance by his judgment creditor of the suing out of an execution that he would erect a house and lease it to the latter, which should operate as a full satisfaction of the judgment, it was held that for a breach of the agreement by the debtor, the measure of damages would be, not the difference between the amount of the judgment and the value of the house, but rather the value of the house.[33]

§ 1347. Gas—Failure to supply.—For the breach of a contract to supply sufficient gas for lighting and heating residences as an equivalent of half of the annual rental agreed to be paid for property, the measure of damages will be such a proportion of half of the rental as the period of the breach bears to a year.[34] And where a gas company contracts to furnish gas for fuel and heat for a dwelling house and fails to supply needed gas during severe winter weather, and other fuel cannot be procured, it has been decided that the damages for such failure may include recovery for the sickness and death of children directly due thereto.[35] But for the removal of the meter whereby a person

[33] Strutt v. Farlar, 16 M. & W. 249.

[34] Kokomo Natural Gas & O. Co. v. Albright, 18 Ind. App. 151; 47 N. E. 682.

[35] Coy v. Indianapolis Gas Co., 146 Ind. 655; 36 L. R. A. 535; 46 N. E. 17; 1 Am. Neg. Rep. 222. It should be noted, however, that this case does not directly decide that such elements may be included in the damages for breach of the contract, for though there was a contract between the parties, it was held that the failure to supply the gas was a tort. In this case it was said, "Common carriers, innkeepers, and telegraph, telephone, water, gas and other like companies, persons and corporations enjoying public franchises are held to owe a duty to the public as well as to all individuals of that public. . . . Not a partial but a full compliance with the company's duty is required and this without any discrimination as to persons having a right to the gas. . . . The failure of the duty on the part of the company as alleged in the complaint is a tort even though the complaint also shows a failure to comply with the contract. The failure to perform such a contract is in itself a tort. . . . The chief objection to the complaint is that the damages sought to be recovered are too remote. Whether the loss to appellant by the sickness and death of his children might be considered as the natural and probable result of a breach of appellee's contract to furnish gas for fuel during the cold weather in the latter part of December, 1892, we need not consider, inasmuch as the action here, as we have seen, is in tort, the contract being but a statement of the reasonable conditions under which the appellee was to furnish the gas in discharge of the

is deprived of the use of gas, it has been held that there can be no recovery for inconvenience unaccompanied by pecuniary loss.[35] Again, where a gas company agrees to supply a factory for a certain period with sufficient gas to operate its plant, it has been decided that the measure of damages for failure to supply the gas as agreed, as a result of which the factory is obliged to suspend business, will be the fair rental value of the property during the period business is suspended, or if it has no rental value then interest on money invested therein, and also on such working capital as lays idle and the use of which has been lost by the breach of the contract, and where the business was a new one, the expenses necessarily incurred in organizing the same, the cost of transportation, from a distance, of skilled men who could not be obtained in the vicinity, and the compensation paid or agreed to be paid, the officers of the company.[37]

§ 1348. Heating apparatus—Greenhouse.—Where a person enters into a contract to supply heating apparatus for a building, in an action to recover for the failure of such apparatus to furnish sufficient heat, evidence is admissible on the question of damages that the defendant knew that such building was intended to be used as a greenhouse.[38]

§ 1349. Invest money—Contract to.—For the breach of a contract to safely invest money for another in mortgages, the measure of damages will be the difference in value between the insufficient mortgages invested in and such mortgages as were safe at the time of investment.[39]

§ 1350. Licenses—Agreement by Crown to issue and renew.—For the breach of an agreement by the Crown to issue and renew from year to year at the will of the licensee a license to enter upon public lands, with the right to exclusive posses-

duty owed by it to appellant. All damages directly traceable to the wrong done and arising without an intervening agency and without fault of the injured person himself, are recoverable in an action of tort." Howard, J.

[35] Detroit Gas Co. v. Moreton Truck & S. Co., 111 Mich. 401; 69 N. W. 659; 3 Det. L. N. 741.

[37] Paola Gas Co. v. Paola Glass Co., 56 Kan. 614; 44 Pac. 621.

[38] Kramer v. Messner, 101 Iowa, 88; 69 N. W. 1142.

[39] Coffing v. Dodge, 167 Mass. 231; 45 N. E. 928.

sion of the same and to cut timber thereon, there may be a recovery by the licensee of moneys paid for ground rents and houses as a condition precedent to granting the application, but moneys expended in preparations for carrying on business, such as building a mill and making surveys, are not recoverable where owing to the adverse determination of a dispute, which was pending at the time of the application and was known to the licensee, the Crown was unable to carry out its agreement.[40]

§ 1351. Literary work—Contract to publish.—Where publishers entered into a contract with an unknown author to publish a book for her, she to pay them a certain sum of money, such sum to be repaid when a certain number of copies had been sold, in an action against them for a breach of the contract in failing to publish such book, it was decided that the damages which she could recover were limited to the sum which had been paid by her and that she could not recover for loss of manuscript, the evidence of such damages being speculative.[41]

§ 1352. Loan money—Agreement to.—Where a person agrees to loan to a contractor money necessary for the construction of a railroad he will, in an action for the breach of such contract, be liable for the profits which would have been made out of the construction of the road.[42] But where the borrower intends to erect dwelling houses with the money loaned him, he cannot recover for loss of rent during the time that he is compelled to postpone his building operations for lack of money which he is unable to procure elsewhere.[43] And nominal damages only can be recovered in such a case where it does not appear that the plaintiff attempted to obtain the money elsewhere or that it could not have been so obtained.[44] Again, where a loan broker who has made arrangements with a mortgage company to send loans to it, is informed by an applicant

[40] Bulmer v. Reg, 3 Can. Exch. 184.

[41] Bean v. Carleton, 58 Hun (N. Y.), 611; 36 N. Y. St. R. 124; 12 N. Y. Supp. 520. Compare Bean v. Carleton, 51 Hun (N. Y.), 318; 21 N. Y. St. R. 220; 4 N. Y. Supp. 61.

[42] Griggs v. Day, 21 App. Div. (N. Y.) 442; 47 N. Y. Supp. 609.

[43] Levinski v. Middlesex Bkg. Co. (C. C. App. 5th C.), 98 Fed. 449; 34 C. C. A. 452.

[44] Gooden v. Moses (Ala.), 13 So. 765.

for a loan that he desires to purchase a piece of land upon which there is a coal bed, it is decided that in an action against the company for breach of the contract to make the loan, the plaintiff is not entitled to recover the difference between the price at which he had bargained for the land and that for which it could have been brought after the owner discovered the existence of coal, in the absence of evidence showing knowledge of the company's agent as to the use to which the borrower intended to put the money or as to what was the actual value and extent of the coal bed.[45] Where, however, a person agrees to make a loan to the owner of property and out of the proceeds to discharge a chattel mortgage thereon, and as a result of a breach of such agreement the property is foreclosed and sold, the measure of damages will be the difference between the value of the property and the amount of liens upon it at the time of the sale.[46] But if the refusal to make the loan is known to the owner in ample time to give him an opportunity to procure the loan elsewhere for such purpose and he could have procured it, only nominal damages are recoverable.[47] And if the only damage is that the intending borrower is obliged to pay a higher rate of interest, no other damages should be awarded.[48] No damages however can be recovered for such increased rate unless it appear that the plaintiff was unable to obtain money at the stipulated rate of interest from any other source.[49] Again, it has been decided that substantial damages are not recoverable for the breach of an executory contract to loan money where no definite time is agreed upon for the continuance of the loan as the law implies an agreement to pay it on demand.[50]

§ 1353. Mails—Contract to carry.—Where a person enters into a contract with the government to carry the mails for a certain sum, it being provided that he shall forfeit such fines

[45] Equitable Mortg. Co. v. Thorn (Tex. Civ.), 26 S. W. 276.

[46] Douskess v. Burger Brew. Co., 20 App. Div. (N. Y.) 375; 47 N. Y. Supp. 312.

[47] Lowe v. Turpie, 147 Ind. 652; 37 L. R. A. 233; 44 N. E. 25, reh'g denied 47 N. E. 150; 37 L. R. A. 245.

[48] McGee v. Wineholt, 23 Wash. 748; 63 Pac. 571.

[49] Blue v. Capitol Nat. Bank, 145 Ind. 518; 43 N. E. 655.

[50] Kelly v. Fahrney, 97 Fed. 176, contra Goldsmith v. Holland Trust Co., 5 App. Div. (N. Y.) 104; 38 N. Y. Supp. 1032.

as the postmaster general may impose for delinquencies, and such contract is sublet by him for a consideration less than the remuneration he is to receive, he may, in an action against the subcontractor and his sureties for a breach of the contract by abandoning it, recover the profit which he would have made upon the work, the amount of fines imposed and the cost of temporary service between the time when the subcontractor refused to carry the mails and when he began the work, where his sureties bound themselves for the faithful performance by the subcontractor of the contract of the original contractor with the government.[51]

§ 1354. Manufacture and "vigorously push" sale.—In an action for breach of a contract to manufacture and "vigorously push" the sale of a patented article, the measure of damages cannot be based upon sales of the medicine prior to the making of such contract.[52]

§ 1355. Mining contracts.—For the breach of a contract for mining ore profits which are not uncertain or remote and which were obviously within the intent and mutual understanding of both parties at the time of entering into the contract may be recovered.[53] And the damages for breach of such a contract may include a necessary expenditure for rails for a side track.[54] But the expense of sharpening picks claimed as part of the value of work done on a mining location should not, it has been decided, be included where it does not appear that such work was done on the premises, and no explanation in reference thereto is given.[55] And where as a part of the consideration for the sale of a mine the vendee agreed to work the same in mine fashion, the measure of damages for a breach of such agreement is limited to the amount by which the security for the purchase price afforded by a trust deed is impaired and does not necessarily include the entire damage resulting to the property.[56]

[51] Woodlief v. Logan, 51 La. Ann. 1935; 26 So. 627.

[52] Lord v. Owen, 35 Ill. App. 382.

[53] Anvil Min. Co. v. Humble, 153 U. S. 540; 38 L. Ed. 814; 14 Sup. Ct. R. 876.

[54] Worthington v. Given, 119 Ala. 44; 43 L. R. A. 382; 24 So. 739.

[55] Hirschler v. McKendricks (Mont.), 40 Pac. 290.

[56] Belmont Min. & M. Co. v. Costigan, 21 Colo. 471; 42 Pac. 647.

§ 1356. News reports—Contract to furnish.—Where a person enters into a contract to furnish news reports for a definite time for a sum not to exceed a certain amount per week, in an action by him for a breach thereof where no evidence is offered as to the value of such contract except the amount which is specified therein as the maximum amount per week, only nominal damages are recoverable.[57]

§ 1357. Patented improvement—Use of.—Where the licensee under a contract for the use of a patented improvement upon a machine agrees to energetically pursue the manufacture of such machines so that the supply shall not fall short of the demand, in an action for the breach of such contract by him the measure of damages is not to be determined by the amount of royalty specified to be paid upon all machines other than the patented ones manufactured by the lessee, since it does not necessarily follow that the latter could have been sold by him to the extent that the former, which was of another character and embodied other inventions, could have been sold.[58]

§ 1358. Payment of money—Breach of contract for.—In an action to recover damages for the breach of a contract for the payment of money, the recovery is limited to the amount due on the contract with interest at the legal rate, as damages,[59] the plaintiff not being permitted to recover what he might have made by the use of the money.[60] But where in the case of bonds authorized by the legislature, the interest is in excess of the or-

[57] United Press v. New York Press Co., 35 App. Div. (N. Y.) 444; 54 N. Y. Supp. 807.

[58] Standard Sewing Mach. Co. v. Leslie (C. C. App. 7th C.), 24 C. C. A. 107; 46 U. S. App. 680; 78 Fed. 325.

[59] Loudon v. Taxing District, 104 U. S. 771; 26 L. Ed. 923; Guy v. Franklin, 5 Cal. 416; Beckwith v. Trustees, 29 Conn. 268; 76 Am. Dec. 599; Hoblit v. Bloomington, 71 Ill. App. 204; Brown v. Maulsby, 17 Ind. 10; Gillen v. Peters, 39 Kan. 489; 18 Pac. 613; Griffin v. Creditors, 6 Rob. (La.) 216; Daniels v. Ward, 4 Minn. 168; Mason v. Callender, 2 Minn. 350; 72 Am. Dec. 102; Dill v. Crum, 39 Mo. App. 508; Gatewood v. Moses, 5 Rich. L. (S. C.) 244; Morrison v. Seabright, 4 Baxt. (Tenn.) 476; Watkins v. Junker, 90 Tex. 584; 40 S. W. 11; Good v. Caldwell, 11 Tex. Civ. App. 515; 33 S. W. 243; Arnott v. Spokane, 6 Wash. 442; 33 Pac. 1063; 44 Am. & Eng Corp. Cas. 511.

[60] Hoblit v. Bloomington, 71 Ill. App. 204.

dinary legal rate, the damages will be estimated at the contract rate of interest.[61] Again, if there has been a change in the legal rate between the time of the infliction of the injury and that of the recovery, it has been decided that the latter rate controls.[62] This general rule as to the measure of damages for the nonpayment of money, applies likewise for breach of a contract to pay the debt of a third person.[63]

§ 1359. Pledged property—Agreement to redeem.—Where a person has entered into an agreement to redeem personal property pledged for a specified amount, he will be liable in an action for the breach thereof, for the amount of the loan, and proof of the value of the property is unnecessary.[64]

§ 1360. Printing contracts.—The measure of damages to a printer for the breach of a contract to have a certain amount of printing done will be the price agreed to be paid less the probable reasonable expenses of printing the same.[65]

§ 1361. Profession—Agreement not to practice—Physician.—Where a physician enters into an agreement not to practice, the measure of damages for a breach thereof by him of such agreement has been held to be the value of the practice lost to the plaintiff between the time when practice was resumed by the defendant and the time when the suit was commenced.[66]

§ 1362. Profits—Sharing of.—For the breach of an agreement to enter into a contract to share profits, the plaintiff may recover the share of the profits to which he would have been entitled had such contract been entered into.[67] And such recovery will not be prevented by the fact that they cannot be determined with certainty.[68] So there may be a recovery for

[61] Beckwith v. Trustees, 29 Conn. 268; 76 Am. Dec. 599.

[62] Watkins v. Junker, 90 Tex. 584; 40 S. W. 11.

[63] Lathrop v. Atwood, 21 Conn. 117; Furnas v. Durgin, 119 Mass. 500; 20 Am. Rep. 341; Sturges v. Crum, 29 Mo. App. 644; Richards v. Whittle, 16 N. H. 259.

[64] Levien v. Levi, 16 Misc. (N. Y.) 80; 37 N. Y. Supp. 689; 73 N. Y. St. R. 288.

[65] St. Louis, A. & T. R. Co. v. Beard, 60 Ark. 151; 29 S. W. 146.

[66] Warfield v. Booth, 33 Md. 63.

[67] Canfield v. Johnson, 144 Pa. St. 61; 22 Atl. 974; 29 W. N. C. 117; 48 Phila. Leg. Int. 440.

[68] Crittenden v. Johnston, 7 App. Div. (N. Y.) 258; 40 N. Y. Supp. 87.

the breach of an agreement to conduct a hotel or boarding house on shares.[69] And for the breach of a contract to pay a share of the profits of a quarry so long as it can be profitably worked, the measure of damages will be such share of prospective profits determined from past and present profits for such a length of time as it may appear that the quarry could probably be operated at a profit.[70] Again, where a person in consideration of his time and services in the management of property is by contract to receive an equal share of the profits from the sale of such property which has been purchased in the name of and paid for by the other party to the contract, he will not in case of the breach of such contract be limited to a recovery of the value of his services to the time of the breach.[71] Where, however, an agreement of the kind is illegal in its nature, there can be no recovery. Thus it has been so decided where an agreement was entered into, between two bidders for a public contract, for a division of the profits, it being agreed that one of them should put in a highly excessive bid in order to induce the award of the contract to the other at an excessive figure.[72]

§ 1363. Railroad passes — Contracts to furnish. — The measure of damages for the breach of a contract by a railroad company to furnish a person with a free pass over its road, is the value of such pass, to be approximated as closely as the nature of the case will admit.[73] And it has been in such a case that the payment of the amount expended by the plaintiff for railroad fare is a compensation therefor.[74]

§ 1364. Scholarship.—A certificate of permanent scholarship in a college is a valid contract, and the measure of damages, for a breach of the same by the college, is the value of the scholarship with interest, but if no marketable value is shown, the prima facie value is declared to be the price paid.[75]

[69] Crittenden v. Johnston, 7 App. Div. (N. Y.) 258; 40 N. Y. Supp. 87.

[70] Treat v. Hiles (Wis.), 50 N. W. 896.

[71] Clarkson v. Whitaker, 12 Tex. Civ. App. 483; 38 S. W. 1032.

[72] McMullan v. Hoffman (C. C. D. Oreg.), 69 Fed. 509.

[73] Erie & Pittsburgh R. R. Co. v. Douthet, 88 Pa. St. 243; 32 Am. Rep. 451.

[74] Curry v. Kansas & C. P. Ry. Co., 61 Kan. 541; 60 Pac. 325.

[75] Trustees of Howard College v. Turner, 71 Ala. 429; 46 Am. Rep. 326.

§ 1365. Steam for power.—In an action to recover damages for the breach of a contract to furnish steam for power in a mill, it has been decided that there can be no recovery for loss of profits upon evidence which merely shows that if the power contracted for had been furnished a certain number of bushels could have been ground per day on which the profit would have been a certain amount.[76]

§ 1366. Stock—Refusal to issue or deliver.—The measure of damages for the wrongful refusal of a corporation to issue stock is the value of the stock at the time of demand, together with such dividends as have accrued thereon at such time.[77] And for the refusal to deliver stock to the owner upon demand, which is subsequently delivered to him, he may recover the difference between the value of the stock when demanded and when delivered.[78] Again, in an action upon a note given by a subscriber to the stock of a company, damages growing out of the breach of the agreement to procure the incorporation of the company and furnish such subscriber with his shares, may be interposed by him by way of recoupment or set-off.[79] But for refusal to deliver a certificate for corporate stock to be issued in the future which has no actual or market value, only nominal damages are recoverable, though it would have cost its par value to obtain such stock.[80]

§ 1367. Subscription to corporate stock.—For the breach of an agreement to subscribe to the stock of a corporation, it has been decided that there may be a recovery, as damages, of the difference between the par value of such stock and its market value.[81]

§ 1368. Support—Agreements as to.—Upon the breach of a contract to support another, an action on the contract as an

[76] Wolf v. Huass, 11 Misc. (N. Y.) 561; 66 N. Y. St. R. 181; 32 N. Y. Supp. 798.

[77] Baltimore City Pass. Ry. Co. v. Sewell, 35 Md. 238; 6 Am. Rep. 402.

[78] McDonald v. Mackinnon (Mich.), 62 N. W. 560.

[79] Davis & R. Bldg. & Mfg. Co. v. Moberly, 65 Ill. App. 228.

[80] Barnes v. Brown, 139 N. Y. 372; 42 N. Y. St. R. 536; 29 N. E. 760.

[81] International Fair & E. Assn. v. Walker, 88 Mich. 62; 49 N. W. 1086; 36 Am. & Eng. Corp. Cas. 233; 10 Ry. & Corp. L. J. 450.

entirety may be maintained and there may be a recovery for the support up to the time of the trial and also prospective damages for the loss of such support in the future.[82] So where a person has agreed to support another in consideration of services rendered by him, the measure of damages for a breach of the contract by a failure or refusal to furnish such support is the expense of the same which defendant has failed to furnish up to the time of the trial, and also the prospective expense during the rest of plaintiff's life.[83] And in such case it has been decided that the recovery should be for such a sum as together with reasonable interest and with what plaintiff could reasonably contribute to his own support by his labor, will be sufficient to support him from the time of the breach during the remainder of his life and not such a sum as will support him without taking into consideration his probable earnings.[84] Again, where a person has agreed to keep in his family and support the daughter of another, but after compliance with the contract for a time, the daughter is placed in an asylum where she remains until her death, the recovery in such case should be the difference between the care and treatment actually received, and that called for by the contract and not the whole consideration received for her support.[85] But where an adult son agrees to support his parents no action will lie for damages resulting from the performance of such contract being prevented owing to his death through defendant's negligence, the damages therefor being too remote.[86]

§ 1369. Theatrical contracts, lectures, games, etc.—For the breach of a contract to deliver a lecture there may be a recovery of such profits as the plaintiff would have made had defendant performed his contract.[87] But in an action for the breach of a

[82] Freeman v. Fogg, 82 Me. 408; Parker v. Russell, 133 Mass. 74; Emple v. Emple, 35 App. Div. (N. Y.) 51; 54 N. Y. Supp. 402; Thompson v. Stevens, 71 Pa. St. 162.

[83] Carpenter v. Carpenter, 66 Hun (N. Y.), 177; 49 N. Y. St. R. 40; 20 N. Y. Supp. 928.

[84] Morrison v. McAtee (Oreg. 1893), 32 Pac. 400. See also Thompson v. Stevens, 71 Pa. St. 162.

[85] Vancleave v. Clark, 118 Ind. 61; 3 L. R. A. 519; 20 N. E. 527.

[86] Brink v. Wabash R. Co., 160 Mo. 87; 60 S. W. 1058.

[87] Savery v. Ingersoll, 46 Hun (N. Y.), 176; 11 N. Y. St. R. 637.

contract to give a play for a week at a certain theatre, the fact that a fair audience was attracted by the first performance of an untried play by a company of no special importance, is not sufficient to justify an inference as to the probable aggregate receipts had the play been given as agreed and affords no basis for an award of such profits as damages.[88] And where the manager of a baseball team has broken his contract to play a game with another team, the measure of damages for such breach will, in the absence of a proof of loss of profits, be the preparatory expenses incurred by the other party in carrying out its part of the contract.[89] Again, where a theatrical company enters into a contract to play at a certain theatre for seven nights, including Sunday, it has been decided in an action for a breach of such contract by the company, that damages are not recoverable, as, though the contract is separable, the claim for damages is entire and not apportionable to the illegal and legal portions of the contract.[90] It has been decided, however, that the court properly refused to instruct that if part of the business of the plaintiff was to go upon the stage and exhibit her legs in such a manner as is indecent in fact and immoral in its tendencies, the loss of opportunity to earn money in such employment can form no basis for recovering damages for breach of the contract whereby she was to perform as a burlesque opera-bouffe artist, since the showing of the limbs, of such a performer, in silk stockings being both tolerated by law and patronized freely and openly by the public, those who earn a livelihood in such way should not be arbitrarily outlawed by the court.[91] Again, upon the issue whether a play was a success or would have been but for the failure of the leading actor to properly prepare and present the same, evidence may be admitted as to how the play was received by the audience and the dramatic critics.[92] But evidence that an actor is a Shakesperean one of high repute does not form a sufficient basis for the estimation of damages for the

[88] Cutting v. Miner, 30 App. Div. (N. Y.) 457; 52 N. Y. Supp. 288.

[89] Athletic Baseball Asso. v. St. Louis Sportsman's Park, etc., Asso., 67 Mo. App. 653.

[90] Fountain Square Theatre Co. v. Evans (Pac. C. P.), 1 Ohio L. D. 151.

[91] Baumeister v. Markham, 101 Ky. 122; 19 Ky. L. Rep. 316; 41 S. W. 816.

[92] Ellis v. Thompson, 1 App. Div. (N. Y.) 606; 37 N. Y. Supp. 468; 73 N. Y. St. R. 180.

breach of a contract to present one of Shakespeare's tragedies.[93] And where a contract to perform at a certain theatre for one night in consideration of a percentage of the gross receipts is broken, evidence is not admissible of the rental value of such theatre.[94]

§ 1370. Timber—Contracts to cut, etc.—Prospective profits may be recovered in an action for breach of a contract to cut, log, manufacture and load on cars the timber on a tract of land.[95] And in the case of a contract to cut and peel timber, where it has been substantially performed, the measure of damages for a partial failure of performance will be the loss, if any, on that part of the work which is uncompleted.[96] But, for the breach of a contract to clear certain land of logs in time for planting, there should be no allowance for the estimated profits of a crop, which the lessee is prevented from raising, such a loss being too remote and conjectural.[97]

§ 1371. Trains—Contract to stop.—In an action by a hotel proprietor against a railroad company for damages for failure to stop its trains for refreshment purposes, in accordance with its contract so to do, evidence is not admissible as to the average number of passengers per day traveling upon the trains, since no presumption arises from the number of passengers as to what number would patronize the hotel.[98]

§ 1372. Transportation of excursionists.—Where a railroad company repudiates a contract which it has entered into for the transportation of excursionists at reduced rates after the other party to the contract has agreed to sell and deliver tickets at an advanced rate, the latter may recover as damages the amount which he would have received as net profits on the tickets he would have sold.[99]

[93] Todd v. Keene, 167 Mass. 157; 45 N. E. 81.

[94] Hughes v. Robinson, 60 Mo. App. 194; 1 Mo. App. Rep. 76.

[95] Conway v. Fitzgerald, 70 Vt. 103; 39 Atl. 634.

[96] Shires, Shaylor, v. O'Connor, 4 Pa. Super. Ct. 465; 40 W. N. C. 388.

[97] Cundiff v. Cundiff, 18 Ky. Law. Rep. 1059, 56 Alb. L. J. 64; 39 S. W. 433.

[98] Cleveland, C. C. & St. L. R. Co. v. Mitchell, 74 Ill. App. 602.

[99] Houston & T. R. Co. v. Hill, 70 Tex. 51; 7 S. W. 659.

§ 1373. Tuition.—In an action, by one who has entered into a contract to finish board, tuition and incidentals to the son of the other party to the contract, to recover for a breach of such contract, it has been decided that the entire contract price may be recovered as damages in the absence of evidence that the damages resulting from the breach were less than the contract price.[100]

§ 1374. Water power, supply, etc.—In the absence of some evidence which shows a collateral agreement known to the obligor, from which profits would have arisen, or of some other fact or circumstance from which it would appear that profits were in the contemplation of the parties, and were not too remote or speculative, the plaintiff, in an action for breach of a contract to furnish sufficient water power to operate the machinery of a mill or factory, may recover, as the measure of damages, the difference between the rental value of the mill or factory with the power contracted for and with the power actually furnished.[1] But where profits are recoverable, it has been decided that interest from the date of filing the claim may be allowed, in an action against the state for wrongfully shutting off the supply of water to a paper mill.[2] And depreciation in the value of wheat, purchased for use in a mill, during the time water was withheld, has been allowed, in an action for failure to supply water, in accordance with a contract.[3] Again, in an action for failure to furnish the supply of water as contracted for the irrigation of land, evidence is admissible as to the value of a crop that might be produced upon the land, if it were properly irrigated.[4] Evidence, however, as to the fee simple value of the land has been declared inadmissible where its rental value and value if supplied with water for irrigation purposes are permitted to be shown.[5] And likewise where a per-

[100] Fancher v. Pinon, 18 Misc. (N. Y.) 385; 41 N. Y. Supp. 1114.

[1] Witherbee v. Meyer, 155 N. Y. 446; 50 N. E. 58, rev'g 84 Hun, 146.

[2] Lakeside Paper Co. v. State, 45 App. Div. (N. Y.) 112; 60 N. Y. St. R. 1081.

[3] Gordon v. Constantine Hydraulic Co., 117 Mich. 620; 76 N. W. 142; 5 Det. L. N. 395.

[4] Nebraska & D. Land & L. S. Co. v. Burris, 10 S. D. 430; 73 N. W. 919. Compare Knowles v. Leggett, 7 Colo. App. 265; 43 Pac. 154.

[5] Ferrea v. Chabot, 121 Cal. 233; 53 Pac. 689.

son contracts for a water supply, with reference to a certain tract of land owned by him, he cannot, for a breach of such contract, recover damages which accrue to him, by reason of his ownership of an adjoining tract of land which was subsequently purchased by him.[6] Again, where a water company knows that the purpose of the contract, entered into by it, is to furnish water for cattle, it will be liable, where it fails to keep its contract, for any direct injury to cattle resulting therefrom, though the owner of such cattle should use ordinary care to prevent damages resulting from such breach,[7] and, in such a case, it has been decided that the expense of hiring a man to drive cattle a distance of several miles, in order to obtain water, are recoverable, as is also any depreciation in the value of the cattle by reason of their being driven such a distance.[8] In determining, however, the damages to a town, for breach of a contract to furnish it with a stipulated supply of water, the damages suffered by individuals, by reason thereof, should not be taken into consideration.[9] Again, where a person enters into a contract to supply water to the owners or lessees of ice ponds during the ice making season, he will be liable for a breach of such contract, for the market value of the ice formed on the ponds which could have been harvested and stored but for such breach, less the expense which would have been incurred in harvesting and storing the same.[10]

§ 1375. Wells—Contract to bore or drill.—Where a contract is made to bore a well to a sufficient depth to furnish a specified quantity of water at so much per lineal foot, one third to be paid as the work progresses and the balance upon completion, and the owner of the property refuses to pay the one third as agreed, the contractor may recover the contract price for the

[6] Ferrea v. Chabot, 121 Cal. 233; 53 Pac. 689.

[7] Waco Artesian Water Co. v. Cauble, 19 Tex. Civ. App. 417; 47 S. W. 538.

[8] Westfall v. Perry (Tex. Civ.), 23. S. W. 740.

[9] Wiley v. Athol, 150 Mass. 426; 23 N. E. 311; 6 L. R. A. 342. See Bush v. Artesian Hot & C. Water Co. (Idaho), 43 Pac. 69, wherein it is decided that a water company by reason of its breach of contract with a city is not liable to citizens for damages from the destruction of their property by fire, in consequence of such breach.

[10] Farr v. Griffith, 9 Utah, 416; 35 Pac. 506.

CHAPTER LIV.

BREACH OF PROMISE OF MARRIAGE.

§ 1377. Breach of promise of marriage—Generally.
1378. Measure of damages — Elements recoverable.
1379. Injuries to feelings—Wounded pride — Mental suffering.
1380. Aggravation of damages.
1381. Evidence as to wealth of defendant.
1382. Evidence as to wealth of defendant — Social position, value of home, etc., lost to plaintiff.
1383. Seduction in aggravation of damages.
1384. Exemplary damages.
1385. Mitigation of damages.

§ 1377. Breach of promise of marriage—Generally.—Although the action for breach of promise to marry is based on the contract to marry yet it is treated, so far as the measure of damages is concerned, similar to an action in tort.[1] So it has been said that the rules applicable to the determination of the measure of damages in actions upon simple contracts have never been applied to actions to recover for breach of promise to marry.[2] So while in actions to recover for the breach of other contracts the motive which induced the breach are immaterial, yet in actions to recover for breach of the promise or contract to marry, the motive of the party breaking such promise may sometimes be considered.[3] In such actions in order to authorize a recovery there must be evidence of an offer and an acceptance either express or implied,[4] and the plaintiff has the burden of proving the same.[5] But it is not necessary for the plaintiff to prove a prior offer on her part to marry the defendant.[6] And it is not

[1] Goddard v. Westcott, 82 Mich. 180.

[2] Thorn v. Knapp, 42 N. Y. 474.

[3] Duche v. Wilson, 37 Hun (N. Y.), 519.

[4] Yale v. Curtiss, 151 N. Y. 598; 45 N. E. 1125; 55 Abb. L. J. 149; 2 Chic. L. J. Wkly. 151.

[5] McPhail v. Trovillo, 65 Ill. App. 600.

[6] Johnson v. Caulkins, 1 Johns. Cas. 116; Willard v. Stone, 7 Cow. (N. Y.) 22; Olson v. Solveson, 71 Wis. 663; 38 N. W. 329. And see Palmer v. Andrews, 7 Wend. (N. Y.) 142; Kniffen v. McConnell, 30 N. Y.

essential to a recovery by the plaintiff to prove an amatory regard on the part of the defendant towards her.[7] And in an action for damages for breach of promise of marriage, it is no bar thereto that a former action by her for her seduction under the same promise of marriage was decided in favor of the defendant.[8] In estimating the damages recoverable in such an action, the jury should not consider any damages sustained by the plaintiff by reports raised since the commencement of the suit.[9] And as a general rule the damages in an action of this nature must be largely left to the discretion of the jury and a judgment will not be reversed because of the amount, unless it appears to have been the result of prejudice, partiality or corruption.[10]

285; Burke v. Shaver, 92 Va. 345; 23 S. E. 749.

[7] Finkelstein v. Barnett, 17 Misc. (N. Y.) 564; 40 N. Y. Supp. 694.

[8] Ireland v. Emerson, 93 Ind. 1; 47 Am. Rep. 364.

[9] Greenup v. Stoker, 7 Ill. (2 Gilm.) 688.

[10] Hatton v. Chapman, 46 Conn. 607; Douglass v. Gausman, 68 Ill. 170; Sauer v. Schmidt (Ind. App.), 56 N. E. 108; Rime v. Rater, 108 Iowa, 61; 78 N. W. 835; Campbell v. Arbuckle, 21 N. Y. St. R. 412; 4 N. Y. Supp. 29; 123 N. Y. 662; Kelley v. Highfield, 15 Oreg. 277; 14 Pac. 744; Giese v. Schultz, 69 Wis. 521; 34 N. W. 913; Berry v. Da Costa, L. R. 1 C. P. 331; Smith v. Woodfine, 1 C. B. (N. S.) 660. See the following cases where the question of whether verdicts have been excessive is considered: Defendant worth from $50,000 to $75,000, evidence showing seduction of plaintiff under promise to marry—$16,000 not excessive. Gieger v. Payne, 102 Iowa, 581; 69 N. W. 554. Defendant worth from $9,000 to $10,000—bachelor with no one dependent on him—$2,000 not excessive. Kennedy v. Rodgers, 2 Kan. App. 764; 44 Pac. 47. Abrupt and wanton breaking of an engagement with young girl in manner most humiliating to her—defendant worth from $15,000 to $20,000 and engaged in profitable business—good social standing—$4,500 not excessive. McPherson v. Ryan, 59 Mich. 33; 26 N. W. 321. Seduction under promise to marry and disgrace consequent thereupon—$7000 not excessive. Musselman v. Barker (Neb.), 42 N. W. 759, $5,000 held not excessive. Kerns v. Hagenbuckle, 43 N. Y. St. R. 210; 17 N. Y. Supp. 367. A verdict for $45,000, which was 4½ per cent of defendant's estate held not excessive. Campbell v. Arbuckle, 21 N. Y. St. R. 412; 4 N. Y. Supp. 29, aff'g 123 N. Y. 662. Defendant owner of one third interest in firm, having capital stock of $200,000—$10,000 not excessive. Stribley v. Welz, 8 Ohio C. C. 571; 1 Ohio Dec. 621. Evidence showing plaintiff worth $10,000 but declared excessive by defendant—both parties of excellent character and standing—family of plaintiff poor—$2,800 not excessive. Brown v. Odill, 104 Tenn. 250; 56 S. W. 840. Plaintiff, widow, aged forty-six—no proof of defendant's circumstances—$2,500 exces-

§ 1378. Measure of damages—Elements recoverable.—Loss of time or employment and the necessary expenses incurred in preparation for the marriage are elements which the jury may consider in estimating the damages which the plaintiff may recover in an action for breach of promise to marry, such damages being directly incidental to the breach.[11] And the jury in estimating the damages in such an action may consider the length of time a marriage engagement has existed.[12] And as tending to show the affection which the plaintiff entertained towards the defendant, evidence that she changed her church membership at his request is admissible.[13] And it is declared that the neighbors and intimate friends of the plaintiff may express their opinion as to the amount of damage she has sustained as a result of the breach.[14] But recovery should not be allowed for services rendered by the plaintiff to the defendant in reliance upon the promise of marriage by the latter, since it is declared that where damages are awarded for the breach of such promise, they amount to the legal equivalent of performance.[15] Nor is evidence of injury to health admissible, unless special damages are averred and stated, since such injury is not considered as the direct, natural and necessary consequence of the breach.[16] And the fact that the plaintiff in reliance upon the promise of the defendant to marry her, broke an engagement with another, is not to be considered estimation of damages, nor should evidence of such fact be admitted.[17] Again, in those cases where the defendant has introduced evidence affecting the reputation of the plaintiff and tending to bring her into disrepute before the jury,

sive. Poser v. Kahrs, 2 City Ct. (N. Y.) 92. Seduction under promise of marriage—defendant receiving from his father salary of $30.00 per week—$7,500 excessive—should be reduced to $2,500. Kolsch v. Jewell, 31 App. Div. (N. Y.) 581. Defendant worth $6,000—no circumstances of aggravation—$3,500 excessive. Kellett v. Robie, 99 Wis. 303; 74 N. W. 781.

[11] Smith v. Sherman, 4 Cush. (Mass.) 408; Walker v. Goldman, 16 Rap. Jud. Queb. C. S. 466. But see Giese v. Schultz, 53 Wis. 462.

[12] Coolidge v. Neat, 129 Mass. 146; Grant v. Willey, 101 Mass. 356; Vanderpool v. Richardson, 52 Mich. 336.

[13] MacElree v. Wolfersberger, 59 Kan. 105; 52 Pac. 69.

[14] Jones v. Fuller, 19 S. C. 66; 45 Am. Rep. 761.

[15] Smith v. Hall, 69 Conn. 651; 38 Atl. 386.

[16] Bedell v. Powell, 13 Barb. (N. Y.) 183.

[17] Hohn v. Bettinger (Minn. 1900), 83 N. W. 467.

the plaintiff may introduce evidence as to good character and reputation for virtue, chastity and honesty.[18]

§ 1379. Injuries to feelings—Wounded pride—Mental suffering.—The plaintiff in an action for breach of promise of marriage may recover for injury to her affections, feelings and for her pain, mortification and wounded pride.[19] So a witness may be permitted to testify in such an action as to the mental difference he observed in the plaintiff after the defendant had ceased to visit her.[20] And testimony of the plaintiff as to her mental suffering due to inattention on the part of the defendant subsequent to the postponement of the marriage and before he had announced his determination not to marry her, is admissible.[21] In order, however, that the plaintiff may recover for these elements, there must be evidence showing that she in fact so suffered.[22] And the amount of damages to be awarded for such elements must depend on the discretion and enlightened consciences of impartial jurors.[23] For the wounded feelings, however, of the family or friends of the plaintiff there can be no recovery by the plaintiff in an action for breach of promise and seduction.[24]

§ 1380. Aggravation of damages.—Where the breach of a promise of marriage has been attended by circumstances of aggravation the plaintiff is entitled to show such circumstances for the purpose of enhancing the damages.[25] So evidence may be given that the defendant induced the plaintiff to give up a

[18] Jones v. Layman, 123 Ind. 569; 24 N. E. 363.

[19] Parker v. Forehand, 99 Ga. 743; 28 S. E. 400; Rime v. Rater, 108 Iowa, 61; 78 N. W. 835; Robertson v. Craver (Iowa), 55 N. W. 492; Kennedy v. Rodgers, 2 Kan. App. 764; 44 Pac. 47; Tobin v. Shaw, 45 Me. 331; Coolidge v. Neat, 129 Mass. 146; Harrison v. Swift, 13 Allen (Mass.), 144; Rutter v. Collins (Mich.), 61 N. W. 267; Liese v. Meyer, 143 Mo. 547; 45 S. W. 282; Walters v. Cox, 67 Mo. App. 299; Bird v. Thompson, 96 Mo. 424; 9 S. W. 788; Dupont v. McAdow, 6 Mont. 226; Wade v. Kalbfleisch, 58 N. Y. 285.

[20] Tobin v. Shaw, 45 Me. 331.

[21] Rime v. Rater, 108 Iowa, 61; 78 N. W. 835.

[22] Walters v. Cox, 67 Mo. App. 299; Dupont v. McAdow, 6 Mont. 226.

[23] Parker v. Forehand, 99 Ga. 743; 28 S. E. 400.

[24] Bell v. Gilberson, 30 N. B. 10.

[25] Reed v. Clark, 47 Cal. 194; Tubbs v. Van Kleek, 12 Ill. 446; Chesley v. Chesley, 10 N. H. 327; Baley v. Stratton, 11 Pa. St. 316.

position for the purpose of marrying him, that the wedding day was agreed upon, that the usual preparations were made, relatives and guests invited, and that the defendant shamming illness failed to appear.[26] And any imputation against the character of the plaintiff or impeaching her virtue or any other indignity offered her after the commencement of the action or during the trial, may be considered by the jury as an element of damage.[27] So where the defendant in an attempt to justify his breach charges that the plaintiff has been guilty of lascivious conduct with other men, and there is a complete failure to prove such charge, the jury may consider such fact in aggravation of the damages.[28] But the fact that the defendant has set up such a defense and failed to prove it is not of itself sufficient to authorize the consideration of this fact by the jury in aggravation of damages where it also appears that the defendant set up such defense in good faith and with a reasonable expectation of proving it.[29] The jury should not, however, consider in aggravation of damages that the defendant was unsuccessful in his attempt to prove that the plaintiff was trying to marry another man while she claimed she was waiting for him to marry her.[30] Again, for the purpose of showing the animus of the defendant in his breach and as bearing on an aggravation of the damages, the plaintiff may introduce in evidence an insulting and indecent letter written to her by the defendant after the commencement of the suit.[31] And for the same purpose a statement signed by the defendant and published in a newspaper after

[26] Chellis v. Chapman, 125 N. Y. 214; 35 N. Y. St. R. 17; 26 N. E. 308; 11 L. R. A. 784; 43 Alb. L. J. 167. See Reed v. Clark, 47 Cal. 194.

[27] Ferguson v. Moore, 98 Tenn. 342; 39 S. W. 341. See Roberts v. Druillard (Mich.), 82 N. W. 49.

[28] Reed v. Clark, 47 Cal. 194; Fleetford v. Barnett, 11 Colo. App. 77; 52 Pac. 293; Blackburn v. Mann, 85 Ill. 222; Denslow v. Van Horn, 16 Iowa, 476; Liese v. Meyer, 143 Mo. 547; 45 S. W. 282; Davis v. Slagle, 27 Mo. 600; Thorn v. Knapp, 42 N. Y. 474; 1 Am. Rep. 561; Kniffen v. McConnell, 30 N. Y. 285; Southard v. Rexford, 6 Cow. (N. Y.) 255; Osmun v. Winters, 30 Oreg. 177; 46 Pac. 780; Kelly v. Highfield, 15 Oreg. 277; 14 Pac. 744; Kaufman v. Fye, 99 Tenn. 145; 42 S. W. 25; Alberts v. Albertz, 78 Wis. 72; 10 L. R. A. 584; 47 N. W. 95; Leavitt v. Cutler, 37 Wis. 46.

[29] Denslow v. Van Horn, 16 Iowa, 476; White v. Thomas, 12 Ohio St. 312. See Powers v. Wheatley, 45 Cal. 113.

[30] Simpson v. Black, 27 Wis. 206.

[31] Osmun v. Winters, 30 Oreg. 177; 46 Pac. 780. But see Greenleaf v. McColley, 14 N. H. 303.

the commencement of the action and which reflects upon the character and conduct of the plaintiff is admissible in evidence.[32] So also, where the defendant's breach was attended by defamatory words on his part evidence thereof is admissible as tending to aggravate the damages.[33] So again, where the defendant alleges in his pleading that the plaintiff has no affection for him but entertains a purpose to procure money from him on the pretense of his promise to marry her, and the breach of such promise, which he fails to establish, this may also be considered by the jury.[34] And if an engagement is abruptly broken under circumstances of humiliation, such fact may be considered by the jury in aggravation of damages.[35]

§ 1381. Evidence as to wealth of defendant.—Evidence as to the wealth and financial standing of the defendant in an action for breach of promise of marriage is admissible, and such evidence may be either as to the defendant's general reputation as to wealth or by direct evidence showing the value of property owned by him.[36] So evidence as to the defendant's interest in his father's estate is competent.[37] But it is error to permit plaintiff to testify that the defendant told her that he was the only heir of his uncle who would leave him a large estate.[38] And though evidence is admissible as to the wealth of the defendant in such an action evidence is not admissible where the defendant

[32] Osmun v. Winters, 30 Oreg. 177; 46 Pac. 780.

[33] Chesley v. Chesley, 10 N. H. 327.

[34] Chellis v. Chapman, 125 N. Y. 214; 35 N. Y. St. R. 17; 11 L. R. A. 784; 26 N. E. 308; 43 Alb. L. J. 167.

[35] Grant v. Willey, 101 Mass. 356.

[36] Humphrey v. Brown (C. C. N. D. Cal.), 89 Fed. 640; Collins v. Mack, 31 Ark. 684; Smith v. Hall, 69 Conn. 651; 38 Atl. 386; Richmond v. Roberts, 98 Ill. 472; Rime v. Rater, 108 Iowa, 61; 78 N. W. 835; Rutter v. Collins (Mich.), 61 N. W. 267; Bennett v. Beam, 42 Mich. 346; Tamke v. Vaugsness, 72 Minn. 236; 75 N. W. 217; Casey v. Gill, 154 Mo. 181; 55 S. W. 219; Chellis v. Chapman, 125 N. Y. 214; 35 N. Y. St. R. 17; 11 L. R. A. 784; 26 N. E. 308; 43 Alb. L. J. 167, aff'g 26 N. Y. St. R. 953; 7 N. Y. Supp. 78; Croser v. Craig, 47 Hun (N. Y.), 83; Crandall v. Quinn, 19 J. & S. (N. Y.) 276; Totten v. Read, 16 Daly (N. Y.), 282; 30 N. Y. St. R. 46; 10 N. Y. Supp. 318; Morril v. Palmer, 68 Vt. 1; 33 L. R. A. 411; 33 Atl. 829; Allen v. Baker, 86 N. C. 91; Olson v. Solveson, 71 Wis. 663; 38 N. W. 329; James v. Biddington, 6 C. & P. 589.

[37] Rime v. Rater, 108 Iowa, 61; 78 N. W. 835.

[38] Totten v. Read, 16 Daly (N. Y.), 282; 30 N. Y. St. R. 46; 10 N. Y. Supp. 318.

has married another, as to the wealth of his wife, either for the purpose of showing motive or his social position.[39] Nor is evidence admissible as to the pecuniary circumstances of the defendant's mother.[40] Again, where evidence has been given by the plaintiff, showing the defendant to be worth a certain amount, the latter may show his actual financial standing.[41] But where no evidence has been given by the plaintiff as bearing on the wealth of the defendant, evidence in his own behalf is inadmissible as to his financial standing for the purpose of reducing damages.[42]

§ 1382. Evidence as to wealth of defendant—Social position, value of home, etc., lost to plaintiff.—In an action for breach of promise of marriage evidence of the wealth of the defendant is admissible for the purpose of showing the value of the contract lost to the plaintiff such as the loss of a permanent home and an advantageous establishment including the pecuniary and social privileges which she would have acquired if plaintiff had performed his contract.[43] The rule that it is the object of the law in actions upon contracts to place the plaintiff in as good a position as he would have been if the contract had been fulfilled, applies in the case of actions to recover for breach of promise of marriage. And it is proper to instruct the jury to this effect in such actions. The plaintiff's loss of support by the defendant is an element to be considered and, as showing the character of such support and the various benefits she would have received matrimonially as a result of the defendant's fulfillment of his promise, evidence is admissible of his financial standing.[44]

[39] Crandall v. Quin, 19 J. & S. (N. Y.) 276.

[40] Addis v. Stewart, 4 Misc. (N. Y.) 389; 53 N. Y. St. R. 518.

[41] Casey v. Gill, 154 Mo. 181; 55 S. W. 219.

[42] Wilbur v. Johnson, 58 Mo. 600. But see Burnett v. Beam, 42 Mich. 346.

[43] Humphrey v. Brown (C. C. N. D. Cal.), 89 Fed. 640; Richmond v. Roberts, 90 Ill. 472; Geiger v. Payne, 102 Iowa, 581; 69 N. W. 544; 71 N. W. 571; Rime v. Rater, 108 Iowa, 61; 78 N. W. 835; Kennedy v. Rodgers, 2 Kan. App. 764; 44 Pac. 47; Lawrence v. Cook, 56 Me. 187; Coolidge v. Neat, 129 Mass. 146; Harrison v. Swift, 13 Allen (Mass.), 144; Tamke v. Vaugsness, 72 Minn. 236; 75 N. W. 217; Dufont v. McAdam, 6 Mont. 226; Crosier v. Craig, 47 Hun (N. Y.), 83; Dent v. Pickens, 34 W. Va. 240; Olson v. Solveson, 71 Wis. 663.

[44] Lawrence v. Cooke, 56 Me. 187.

So for this purpose evidence of representations made by the defendant to the plaintiff as to his wealth and her belief in the truth or falsity of them is admissible.[45] And where the defendant was shown to be worth from fifty thousand to seventy-five thousand dollars it was held proper to instruct the jury that they might consider the money value of the advantages of a home and domestic establishment of a kind suitable to the wife of a person of defendant's station in life.[46] So evidence of the wages or salary which the defendant in such an action is receiving is admissible for the purpose of showing his ability to earn money and the position in life which plaintiff might reasonably have received if the contract had been fulfilled.[47] But if the loss of a permanent home is not shown by the evidence, it is held that the jury should not consider in the assessment of the damages the money value of such a home.[48]

§ 1383. Seduction in aggravation of damages.—In an action for breach of promise of marriage where it appears that the plaintiff was seduced by the defendant, evidence that the seduction was accomplished by means of the promise is admissible and may be considered by the jury as an aggravation of damages.[49] And the plaintiff in such an action may show in aggrava-

[45] Humphrey v. Brown (C. C. N. D. Cal.), 89 Fed. 640.

[46] Geiger v. Payne, 102 Iowa, 581; 69 N. W. 544; 71 N. W. 571.

[47] Rime v. Rater, 108 Iowa, 61; 78 N. W. 835.

[48] Dunlap v. Clark, 25 Ill. App. 753.

[49] Espy v. Jones, 37 Ala. 379; Fleetford v. Barnett, 11 Colo. App. 77; 52 Pac. 293; Hattin v. Chapman, 46 Conn. 607; Kelly v. Riley, 106 Ill. 339; 8 Am. Rep. 336; Fidler v. McKinley, 21 Ill. 308; Tubbs v. Van Kleek, 12 Ill. 446; Sauer v. Schulenberg, 33 Md. 288; 3 Am. Rep. 174; Paul v. Frazier, 3 Mass. 73; Sheahan v. Barry, 27 Mich. 217; Liese v. Meyer, 143 Mo. 547; 45 S. W. 282; Bird v. Thompson, 96 Mo. 424; 9 S. W. 788; Green v. Spencer, 3 Mo. 318; Hill v. Maupin, 3 Mo. 323; Musselman v. Barker, 26 Neb. 737; Coil v. Wallace, 24 N. J. L. 291; Jennette v. Sullivan, 63 Hun (N. Y.), 361; 43 N. Y. St. R. 641; 18 N. Y. Supp. 266; Kniffen v. McConnell, 30 N. Y. 285; Hotchkins v. Hodge, 38 Barb. (N. Y.) 117; Wells v. Padgett, 8 Barb. (N. Y.) 323; Matthews v. Cribbett, 11 Ohio St. 330; Osmun v. Winters (Oreg.), 35 Pac. 250; Mains v. Lederer, 21 R. I. (part 2) 164; 21 R. I. 370; 43 Atl. 876; Kauffman v. Fye, 99 Tenn. 145; 42 S. W. 25; Goodall v. Thurman, 1 Head (Tenn.), 209; Daggett v. Wallace, 75 Tex. 352; 13 S. W. 49; McKinsey v. Squires, 32 W. Va. 41; Dent v. Pickens, 34 W. Va. 240; Giese v. Schultz, 69 Wis. 521; 34 N. W. 913; Matthews v. Curtis, 11 Wis. 424. But see Cates v. McKinney, 48 Ind. 562; 17 Am.

tion of damages, that the purpose of the defendant in entering into the marriage contract was to accomplish her seduction, though he was not successful in carrying out his intention.[50] And it is proper to charge the jury that if they believe the defendant entered into the marriage contract for the purpose of seducing the plaintiff, they may consider such fact in aggravation of damages.[51] And though the parent may have an action for seduction, this will not prevent the consideration of such element in an action for breach of promise.[52] If as a result of the seduction of the plaintiff, a bastard child is born, it is held that there may be a recovery for the pain and humiliation of giving birth to such child.[53] And where damages are claimed by the plaintiff for her seduction by the defendant, evidence is admissible that since the seduction she has been "sneered at" on the street.[54] If, however, the right is conferred upon a woman by statute to recover for her own seduction, in an action for breach of promise of marriage she cannot enhance the damages by evidence of her seduction by the defendant unless it is alleged in the complaint.[55] Where it is claimed in an action of this nature that the defendant seduced the plaintiff, the burden of proof is upon the latter to establish such fact.[56] In a case in Maine, it is held that in an action for breach of promise of marriage, the plaintiff cannot recover for injuries to her bodily health resulting from seduction and pregnancy.[57] And again, the plaintiff cannot recover for loss of service or the expenses of sickness which might or might not result from the seduction, since they are declared not to be the proximate results of the

Rep. 768; Burks v. Shain, 2 Bibb (Ky.), 341; Weaver v. Bachert, 2 Pa. St. 80; Perkins v. Hersey, 1 R. I. 493.

[50] Kaufman v. Fye, 99 Tenn. 145; 42 S. W. 25. In this case evidence was admitted showing that the defendant induced the plaintiff to visit him for the purpose of debauching her and that subsequently he entered into the marriage contract for the same purpose, intending to violate the contract, although he was not successful in accomplishing his purpose.

[51] Goodall v. Thurman, 1 Head (Tenn.), 209.

[52] Goodall v. Thurman, 1 Head (Tenn.), 209.

[53] Wilds v. Bogan, 57 Ind. 453.

[54] Musselman v. Barker (Neb.), 42 N. W. 759.

[55] Cates v. McKinney, 48 Ind. 562; 17 Am. Rep. 768; Tyler v. Salley, 82 Me. 128. But see Osmun v. Winters (Oreg.), 35 Pac. 250.

[56] Liese v. Meyer, 143 Mo. 547; 45 S. W. 282.

[57] Tyler v. Salley, 82 Me. 128; 19 Atl. 107.

breach of promise to marry, though they may be of the seduction.[58]

§ 1384. Exemplary damages.—Though the act of the defendant in an action for breach of promise, in breaking such promise may not be justifiable, yet if there was no malice or wantonness in such act or other grounds of aggravation in his relations to the plaintiff but the breach was accomplished with all proper regard, so far as possible, for the feelings of the plaintiff and in a manner calculated to least injure her in any way, the plaintiff is properly entitled to recover only compensatory damages.[59] But where it appears that improper motives existed on the part of the defendant at the time he entered into the engagement, or that he acted wantonly or maliciously in the breach of such promise; or unnecessarily injured the feelings or reputation of the plaintiff; or there appear any other circumstances of aggravation, the jury may, in their discretion, award punitive or exemplary damages.[60] But it is improper to instruct the jury that they are "bound" to give exemplary damages if the defendant acted maliciously.[61] They should rather be instructed that they may award such damages in such a case, if in the exercise of a sound discretion they believe the plaintiff entitled thereto.[62] But it is declared that such damages are not recoverable unless specially pleaded.[63] And where the moral character of the plaintiff is bad, there can be no recovery of exemplary damages by her for breach of promise to marry and this is declared to be the case even though the defendant knew of her character at the time of making the promise.[64] Nor can such damages be recovered in such an action where the acquaintance and engagement was short and there was no evidence showing malicious-

[58] Giese v. Schultz, 53 Wis. 462.

[59] Johnson v. Jenkins, 24 N. Y. 252; Moore v. Hopkins, 83 Cal. 270. See Goddard v. Westcott, 82 Mich. 180; 46 N. W. 242.

[60] Kurtz v. Frank, 76 Ind. 594; 40 Am. Rep. 275; Tamke v. Vaugsness, 72 Minn. 236; 75 N. W. 217; Johnson v. Travis, 33 Minn. 231; Dupont v. McAdow, 6 Mont. 226; Coryell v. Colbaugh, 1 N. J. L. 77; Thorn v. Knapp, 42 N. Y. 474; Johnson v. Jenkins, 24 N. Y. 252; Kelly v. Highfield, 15 Oreg. 278.

[61] Jacobs v. Sire, 4 Misc. (N. Y.) 398; 53 N. Y. St. R. 515; 23 N. Y. Supp. 1063.

[62] Tamke v. Vaugsness, 72 Minn. 236; 75 N. W. 217.

[63] Dupont v. McAdow, 6 Mont. 226.

[64] Clement v. Brown, 57 Minn. 314; 59 N. W. 198.

ness or wrongful intent except that after refusing to marry the plaintiff, the defendant proposed an unlawful alliance and she knew both during the time of the courtship and the engagement that a similar alliance or relation existed between him and another.[65]

§ 1385. Mitigation of damages.—An offer made by the defendant, after the commencement of an action for breach of promise of marriage, to marry her is admissible in mitigation of damages.[66] And for the same purpose he may also show that he was, to plaintiff's knowledge, at the time of the breach afflicted with an incurable disease and that marriage would have had an injurious effect upon him and probably have shortened his life.[67] Lewd and unchaste conduct on the part of the plaintiff with another man or with several men is a fact which the jury may also consider in justification of the breach, and it is immaterial whether such conduct occurred before or after the promise, if unknown to the defendant.[68] So the fact may be shown that the plaintiff was, at the time of the commencement of the action, living as the mistress of another man.[69] But where the defendant at the time of the promise had knowledge of the lewd and immoral conduct of the plaintiff and both encouraged her and participated in such conduct, her lewdness or immorality cannot be considered in mitigation of damages.[70] In another case, however, it is declared that an unchaste woman cannot be damaged to the same extent as a chaste woman by a breach of promise to marry, and that, therefore, though the defendant may have had knowledge of the plaintiff's intimacy with another man, both at the time he made the promise and subsequent thereto, yet such inti-

[65] Walters v. Schultz, 1 Misc. (N. Y.) 196; 49 N. Y. St. R. 443; 50 N. Y. St. R. 910; 21 N. Y. Supp. 768; 20 N. Y. Supp. 886.

[66] Kelly v. Renfro, 9 Ala. 325. But see Kurtz v. Frank, 76 Ind. 594.

[67] Sprague v. Craig, 51 Ill. 288; Mabin v. Webster, 29 Ind. 430; 28 N. E. 863. See Allen v. Baker, 86 N. C. 99. But see Hall v. Wright, El. Bl. & El. 746; 29 L. J. Q. B. 43; Bennett v. Beam, 42 Mich. 346.

[68] Denslow v. Van Horn, 16 Iowa, 476; Boynton v. Kellogg, 3 Mass. 189; Palmer v. Andrews, 7 Wend. (N. Y.) 142; Johnson v. Caulkins, 1 Johns. Cas. (N. Y.) 116; Willard v. Stone, 7 Cow. (N. Y.) 22; Dupont v. McAdow, 6 Mont. 226; Alberts v. Albertz, 78 Wis. 72; 10 L. R. A. 584; 47 N. W. 95.

[69] Dupont v. McAdow, 6 Mont. 226.

[70] Fleetford v. Barnett, 11 Colo. App. 77; 52 Pac. 293.

macy may be considered by the jury in mitigation of damages.[71] Such conduct, however, on the part of the plaintiff if known to the defendant at the time of the promise cannot be considered as a justification for a breach of the promise but he must respond in some damages therefor.[72] Though evidence of immoral conduct on the part of the plaintiff is admissible either as a justification for the breach or in mitigation of the damages, the defendant, who has seduced the plaintiff and made her pregnant, cannot show, either as a justification or in mitigation, the general reputation of the plaintiff which is a result of the seduction and pregnancy and, therefore, of his own misconduct.[73] Excessive and habitual drinking on the part of the plaintiff may also be shown in mitigation of damages.[74] But evidence showing that a woman has been heard to use obscene language is not to be considered in mitigation of damages.[75] Nor is evidence admissible showing misconduct on the part of the plaintiff's mother,[76] or that her mother was a prostitute and the mother of illegitimate children. The immorality or misconduct must be on the part of the plaintiff herself, and evidence as to the character, reputation, or conduct of any particular member of her family aside from herself is inadmissible.[77] Nor can the defendant show in mitigation of damages that the plaintiff had declared that she had no affection for him and would not think of marrying him but for his property.[78] And again, evidence is not admissible of a general reputation or rumor that he had been supplanted by another in the affections of the plaintiff.[79] Nor should a jury consider in mitigation of damages the possibility that the marriage to the defendant might have resulted in unhappiness because of the want of that love and affection which a husband should bear towards his wife.[80] Nor that he was physically in-

[71] Burnett v. Simpkins, 24 Ill. 264.

[72] Denslow v. Van Horn, 16 Iowa, 476; Johnson v. Caulkins, 1 Johns. Cas. (N. Y.) 116; Irving v. Greenwood, 1 C. & P. 350.

[73] Boynton v. Kellogg, 3 Mass. 187.

[74] Button v. McCauley, 1 Abb. Dec. (N. Y.) 282, rev'g 38 Barb. 413.

[75] Grant v. Cornock, 8 Can. L. J. 426.

[76] Lewis v. Tapman, 90 Md. 294; 45 Atl. 459.

[77] Spellings v. Parks, 104 Tenn. 351; 58 S. W. 126.

[78] Miller v. Hays, 34 Iowa, 496; 11 Am. Rep. 154. But see Miller v. Rosier, 31 Mich. 475.

[79] Willard v. Stone, 7 Cow. (N. Y.) 22.

[80] Piper v. Kingsbury, 48 Vt. 480. See Richmond v. Roberts, 98 Ill. 472.

jured by the plaintiff subsequent to the breach.[81] So again the fact that the plaintiff was at the time the defendant promised to marry her engaged to another does not mitigate the damages recoverable where the defendant's promise was not broken for some time after he had knowledge of the previous engagement and of its discontinuance.[82]

[81] Schmidt v. Durnham, 46 Minn. 227.

[82] Alberts v. Albertz, 78 Wis. 72.

CHAPTER LV.

BUILDING AND CONSTRUCTION CONTRACTS.

§ 1386. Substantial performance.
1387. Failure to complete.
1388. Where performance is delayed.
1389. Defects in performance.
1390. Same subject—Evidence.
1391. Where performance is prevented.
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§ 1386. Substantial performance.—A building contractor who has substantially performed his contract with slight unintentional deviations may, as a general rule, recover the contract price less such damages as may arise from deviations.[1] Substantial performance, however, only permits such omissions or deviations from a contract as are inadvertent or unintentional, are not due to bad faith, do not impair the structure as a whole, and may, without injustice, be compensated for by deductions from the contract price.[2] And where it is shown that there are deviations in important particulars from the contract, the plaintiff in an action to recover thereon will not be permitted to show that the work done and materials furnished were in fact as good as were called for by the contract.[3]

[1] Fitzgerald v. La Porte, 64 Ark. 34; 40 S. W. 261; Healy v. Fallon, 69 Conn. 228; 37 Atl. 495; Shepard v. Mills, 70 Ill. App. 72; Ætna Iron & S. Works v. Kossuth County, 79 Iowa, 40; 44 N. W. 215; Pluemacher v. Bataille, 56 N. Y. Supp. 1114; 25 Misc. (N. Y.) 782; Anderson v. Todd, 8 N. D. 158; 77 N. W. 599; Johnson v. Slaymaker, 18 Ohio C. C. 104; 9 Ohio C. D. 500; Smith v. Packard, 94 Va. 730; 27 S. E. 586.

[2] Spence v. Ham, 27 App. Div. (N. Y.) 379; 50 N. Y. Supp. 960.

[3] Anderson v. Todd, 8 N. D. 158; 77 N. W. 599.

§ 1387. Failure to complete.—A contractor who fails to complete his work under the contract may, as a general rule, recover, where the other party has accepted his part performance, a sum not exceeding the contract price, less the cost of completing the work and any damages and added expenses caused by his breach.[4] And such is the rule where the contract provides for the construction of a building for a certain sum payable upon its completion and which also provides that the owner may complete the building at the contractor's expense upon the failure of the latter to complete it.[5] But if, without any reasonable excuse, a substantial part of the work is left unperformed, and the part performed is not done in a skillful and workmanlike manner, it has been decided that there can be no recovery on the contract.[6] And where, under such circumstances, the owner has himself abandoned the work, and it has never been completed, neither the sum which the contractor would have lost had he fulfilled the contract nor the difference between the contract price and the cost of completion can be taken as the measure of damages.[7]

§ 1388. Where performance is delayed.—Where the performance or completion of a contract does not take place until after the expiration of the time limited therefor, in consequence of which delay an injury has been sustained, there may be a recovery, in the case of contracts to complete a building or other piece of work, of the usable value of the property during the period that the performance has been delayed.[8] And where

[4] Sheldon v. Leahy, 111 Mich. 29; 69 N. W. 76; 3 Det. L. N. 554; Muller v. Gillick, 66 Mo. App. 500; Watson v. Dewitt County, 19 Tex. Civ. App. 150; 46 S. W. 1061; Kocher v. Mayberry, 15 Tex. Civ. App. 342, 39 S. W. 604; Arndt v. Keller, 96 Wis. 274; 71 N. W. 651.

[5] Arndt v. Keller, 96 Wis. 274; 71 N. W. 651.

[6] Broadbent v. Marley, 27 Misc. (N. Y.) 778; 57 N. Y. Supp. 765. See Cochran v. Balfe, 12 Colo. App. 75; 54 Pac. 399.

[7] American Surety Co. v. Woods, 105 Fed. 741; 45 C. C. A. 282; 106 Fed. 263.

[8] Snell v. Cottingham, 72 Ill. 161; Hutchinson Mfg. Co. v. Pinch, 91 Mich. 156; 51 N. W. 930; 30 Am. St. Rep. 463; Dengler v. Auer, 55 Mo. App. 548; Ansonia Brass & C. Co. v. Gerlach, 8 Misc. (N. Y.) 256; 59 N. Y. St. R. 197; 28 N. Y. Supp. 546; Reich v. Colwell Lead Co., 50 N. Y. St. R. 298; 21 N. Y. Supp. 495; Ruff v. Rinaldo, 55 N. Y. 664.

the property has a rental value, there may be a recovery for such loss of rents as may be shown to have been sustained.[9] In order, however, to recover for loss of rents it has been decided that it should appear that some opportunity to rent the property has been lost.[10] And where a person sought to recover damages for loss of rent resulting from delay in the completion of a building caused by failure to furnish bricks within the time specified in a contract, it was decided that this was not an element to be considered where it did not appear from the petition that the plaintiff could not have readily purchased bricks in the market, which he needed, at the time defendant failed to deliver them.[11] Again, in an action to recover damages for breach of a contract to construct boilers "complete and all connected" by a certain time, there can be no allowance for profits lost from use of the same where there was nothing in the contract to show the purpose for which they were to be used and nothing in the evidence to show the existence of the conditions necessary to their use.[12] So also, where time is not of the essence of a contract there may be a recovery of the contract price though there is a delay in completion where no claim for damages, for such delay is made and the work was completed by the plaintiff after the time designated with defendant's consent.[13] Damages for delay however may be recouped under the general issue without special plea.[14]

§ 1389. Defects in performance.—Where a person undertakes to do certain work for another, such as the building of a

[9] McIntire v. Barnes, 4 Colo. 285; Hawley v. Florsheim, 44 Ill. App. 320; Korf v. Lull, 70 Ill. 420; Novelty Iron Works v. Capital City Oatmeal Co., 88 Iowa, 524; 55 N. W. 518; Cavode v. Principaal, 110 Mich. 672; 68 N. W. 987; 3 Det. L. N. 539; Consaul v. Sheldon, 35 Neb. 247; 52 N. W. 1104; Curtis v. Van Bergh, 161 N. Y. 47; 55 N. E. 398; Scribner v. Jacobs, 56 Hun (N. Y.), 649; 9 N. Y. Supp. 856; Johnson v. Slaymaker, 18 Ohio C. C. 104; 9 Ohio C. D. 500.

[10] Conover v. Lennon, 46 N. Y. St. R. 18; 18 N. Y. Supp. 162; McCarthy v. Gallagher, 4 Misc. (N. Y.) 188; 23 N. Y. Supp. 884; Wagner v. Corkhill, 40 Barb. (N. Y.) 175.

[11] Laporte Improv. Co. v. Broch, 99 Iowa, 485; 68 N. W. 810; 61 Am. St. Rep. 245.

[12] McKinnon v. McEwan, 48 Mich. 106; 42 Am. Rep. 458.

[13] Burke v. Educational Alliance, 50 N. Y. Supp. 656; 23 Misc. (N. Y.) 163.

[14] Mayer v. Mitchell, 59 Ill. App. 26; Galbraith v. Chicago Architectural Iron Works, 50 Ill. App. 247.

house, the construction of machinery, the manufacture of some article, the making of repairs, or other work specifically prescribed, and there are defects in performance, the work being of a character inferior to that contracted for, there may as a general rule be a recovery as damages of the difference between the value of the work as actually done and the value which it would have had if it had been done properly in pursuance of the contract.[15] This rule has been applied where the materials and work in a house are defective,[16] where a steam boiler contracted for is defective,[17] and where a person agreed to saw lumber so that it could be used for a certain purpose but was so unskillful in performance that it could not be used for the purpose contemplated.[18] While the above may be the measure of damages in most cases and fully compensate for such loss as has been sustained, it may frequently happen that such a recovery would not be a compensation for the actual loss which follows as a natural and probable result of defective performance. Thus where a person agreed to make a roof so that it would be tight for a period of two years, it was decided that the above was the measure of damages for a breach of the contract and that in addition thereto if a loss of the use of the premises was involved there might also be a recovery for such loss.[19] And in another case where the roof as repaired was defective, it was decided that the landlord might recover from the contractor who had undertaken to repair it, such sums as the former had paid to his tenants for injuries received in consequence of the defects, provided the sums paid were not excessive.[20] Again, where the construction of a chim-

[15] Elwood Planing Mill Co. v. Harting, 21 Ind. App. 408; 52 N. E. 621; Sunman v. Clark, 120 Ind. 142; 22 N. E. 113; Short v. Moore, 19 Ky. L. Rep. 1225; 43 S. W. 211; Leathers v. Sweeney, 41 La. Ann. 287; 5 So. 662; Moulton v. McOwen, 103 Mass. 587; White v. Brockway, 40 Mich. 209; Spink v. Mueller, 77 Mo. App. 85; 2 Mo. A. Repr. 52; Lord v. Comstock, 20 J. & S. (N. Y.) 548; Morton v. Harrison, 20 J. & S. (N. Y.) 305; Chamberlain v. Hibbard, 26 Oreg. 428; 38 Pac. 437; Chandler v. Wheeler (Tenn. Ch. App.), 49 S. W. 278; Anderson Elec. Co. v. Clebnrne Water Co. (Tex. Civ. App.), 44 S. W. 929; Larrimore v. Comanche County (Tex. Civ. App.), 32 S. W. 367; Ashland Lime, Salt & Cement Co. v. Shores (Wis. 1899), 81 N. W. 136.

[16] Twitty v. McGuire, 7 N. C. 501.

[17] White v. Brockway, 40 Mich. 209.

[18] Sunman v. Clark, 120 Ind. 142; 22 N. E. 113.

[19] White v. McLaren, 151 Mass. 553; 24 N. E. 911.

[20] Malony v. Brady, 19 N. Y. Supp. 911; 18 N. Y. Supp. 757.

ney in a house was so defective that there was an injury to the house and furniture, a recovery was permitted not only of the expense of a new and proper chimney but also for the injury mentioned.[21] And the reasonable costs incurred and paid for by the owner of a steamboat to remedy defects in the construction of the same have been allowed in an action against the builder.[22]

§ 1390. Same subject—Evidence.—In an action by an owner to recover damages for the builder's failure to conform to the contract, evidence is admissible of specific defects in the building and of specific variations from the contract.[23] And the cost of removing defective material and of replacing it may be shown.[24] But in an action to recover damages for failure to complete a building in accordance with the contract, evidence as to the amount it will require to complete such building should be confined to the cost of completing it in accordance with the plans and specifications which were a part of the contract.[25] And where nothing has been paid by the owner of a building in the process of construction the recovery of damages will be limited to the expense of tearing such building down and nothing will be allowed for the expense of reconstructing it where it has been abandoned by the contractor.[26] Again, evidence as to the prices paid subcontractors who did work on a house is not admissible to show that the house was built of cheap materials or by inferior workmanship.[27] Where, however, damages are claimed by reason of deficiencies in the construction of a building, it may be shown that alleged defects were supplied after the commencement of the action.[28]

§ 1391. Where performance is prevented.—Where the performance of a contract by the contractor is prevented by the other party to the contract, the former may recover as damages

[21] Somerby v. Tappan, Wright (Ohio), 570.

[22] Leathers v. Sweeney, 41 La. Ann. 287; 5 So. 662.

[23] Johnson v. Slaymaker, 18 Ohio C. C. 104; 9 Ohio C. D. 500.

[24] Healy v. Bulkley, 32 N. Y. St. R. 243.

[25] White v. Sisters of Charity, 79 Ill. App. 646.

[26] Charlton v. Scoville, 68 Hun (N. Y.), 348; 52 N. Y. St. R. 306; 22 N. Y. Supp. 883.

[27] Hoadley v. Seward & Son Co., 71 Conn. 640; 42 Atl. 997.

[28] Rauscher v. Cronk, 21 N. Y. St. R. 529.

the difference between what it would have cost to perform the same and what was agreed to be paid therefor under the contract.[29] And a demurrer will not lie to a petition on the ground that it does not show in what sum the plaintiff was damaged, there being no allegation that he would have made any profit on the contract if he had completed the work, since nominal damages may, in any event, be recovered for the breach.[30] Again, where a subcontractor is ordered by the contractor, who has dissolved his contract with the landowner, to discontinue work on the building, he may, in an action for damages, recover the difference between what he was to receive under his contract and what it would cost to do the work, and his recovery should not be diminished because of a contract which he subsequently makes with such landowner to construct the building, on which he makes a profit.[31]

§ 1392. Contract suspended—Rise in price of labor or materials.—Where the work which a contractor has undertaken to perform is unreasonably delayed or suspended by the other party thereto, it has been decided that the latter will be liable for the former's losses caused by a rise in the cost of labor,[32] or for an increase in the cost of materials.[33]

[29] McElwee v. Bridgeport Land & I. Co., 54 Fed. 627; Gleason v. United States, 33 Ct. Cl. 65; Ferris v. United States, 27 Ct. Cl. 542; Tennessee & C. R. Co. v. Danforth, 112 Ala. 80; 20 So. 502; O'Connell v. Main & Tenth Streets Hotel Co., 90 Cal. 515; 27 Pac. 373; Clark v. Scanlan, 33 Ill. App. 48; Lynch v. Sellers, 41 La. Ann. 375; 6 So. 567; 5 L. R. A. 682; Baltimore & C. Const. Co. v. Bush, 88 Md. 665; 41 Atl. 1092; Brandt v. Schuchmann, 60 Mo. App. 70; Gabriel v. Akinsville Pressed Brick Co., 57 Mo. App. 520; Kreamer v. Irwin, 46 Neb. 827; 65 N. W. 885; Gallagher v. Hirsh, 45 App. Div. (N. Y.) 467; 61 N. Y. Supp. 609; Birnhak v. Hollender, 29 Misc. (N. Y.) 640; 61 N. Y. Supp. 118; Miller v. Hahn, 23 App. Div. (N. Y.) 48; 48 N. Y. Supp. 346; Riley v. Black, 1 Misc. (N. Y.) 288; 20 N. Y. Supp. 695; 48 N. Y. St. R. 759; McMaster v. State, 108 N. Y. 542; 15 N. E. 417; 11 Cent. 293; Toledo v. Libbie, 8 Ohio C. D. 589; Feaster v. Richmond Cotton Mills, 51 S. C. 143; 28 S. E. 301; Joske v. Pleasants, 15 Tex. Civ. App. 433; 39 S. W. 586; Watson v. Gray's Harbor Brick Co., 3 Wash. 283; 28 Pac. 527; Conway v. Mitchell, 97 Wis. 290; 72 N. W. 752.

[30] Roberts v. Glass, 112 Ga. 456; 37 S. E. 704.

[31] Olds v. Mapes-Reeves Const. Co., 177 Mass. 41; 58 N. E. 478.

[32] Bitting v. United States, 25 Ct. Cl. 502; King v. Des Moines, 99 Iowa, 432; 68 N. W. 708.

[33] King v. Des Moines, 99 Iowa, 432; 68 N. W. 708.

§ 1393. Place for contractor to store brick.—A contractor, who by agreement with the owner is to be furnished a place for storing brick pending their use in the erection of the building, may, where he is compelled to remove the brick, recover the cost of removing and storing them until they are needed.[34]

§ 1394. Failure to pay installments.—Where a party to a contract fails to pay to the contractor an installment due thereunder, and his acts, conduct and declarations are equivalent to an abandonment by him of the contract in its entirety, the contractor may recover prospective profits as damages.[35] But it has been decided that the mere failure to pay an installment when due is not such a refusal to allow the contractor to proceed as will entitle him to recover such damages.[36]

§ 1395. Same subject—Counterclaim.—In an action for breach of a contract by a railroad to make certain payments as the work of constructing the road progressed, a counterclaim was set up by defendant for failure to construct the road and damages therefor were claimed: (1) For the loss of the use of the road; (2) for the loss of certain freight which it had arranged to carry; and (3) for the sum in excess of the contract price which it would cost to complete the road, and it was decided that the last two clauses were properly stricken out, the former being one which arose on a collateral contract not within the contemplation of the parties, and the latter being uncertain and contingent on the defendant's future construction of the road.[37]

§ 1396. Loss of profits.—Where a contractor fails to complete an ice plant within the time designated by the contract it has been decided that the owner may recover as damages the profits which he would have made had the contract been performed as agreed.[38] And loss of profits of an established busi-

[34] Gallagher v. Hirsch, 45 App. Div. (N. Y.) 467; 6 N. Y. Supp. 609.

[35] Wharton v. Winch, 140 N. Y. 287; 55 N. Y. St. R. 652; 35 N. E. 589.

[36] Moore v. Taylor, 42 Hun (N. Y.), 45.

[37] Hunt v. Oregon Pac. Ry. Co., 36 Fed. 481.

[38] Bryson v. McCone, 121 Cal. 153; 53 Pac. 637.

ness may be recovered for the breach of contract that a railroad will be constructed and in operation to a town site within a given time, the guaranty of its construction being given to induce the removal of the business from a village to such site.[39] But loss of profits on a shipment of goods which a railroad has been obliged to decline are declared to be too remote and speculative to be recovered in an action for failure to complete certain work for the road within a specified time.[40] And it has likewise been determined that in an action for failure to construct a railroad within the time specified, evidence should not be admitted of what the profits of such road were during the corresponding months of the next ensuing year, as from such evidence nothing more than a mere conjecture could be made of what the earnings of the road would have been during the period of delay.[41]

§ 1397. Increased value of land by buildings.—Where a person contracts to erect houses of a specified kind on certain land it has been decided that, for a breach of such contract by him, he will be liable in damages for the difference between the value of the land without such houses, and its value with them.[42] And, in an action to recover damages for the breach of an agreement to erect and operate a steel plant of a stipulated character and capacity on land given to the promisor, adjoining other land owned by the promisee, opinion evidence is admissible as to what the value of plaintiff's land would have been if the contract had been performed.[43] But it has been decided that for failure to construct houses upon lots of a certain tract of land, loss of profits arising from inability to sell other houses and lots of the same tract are too remote and speculative.[44]

§ 1398. Failure to construct sewer so it will not overflow.—In an action against a city for breach of a contract to construct

[39] Arkansas Valley Town & L. Co. v. Lincoln, 56 Kan. 145; 42 Pac. 706.

[40] Atlantic & D. Ry. Co. v. Delaware Const. Co., 98 Va. 503; 37 S. E. 13; 2 Va. Sup. Ct. R. 430.

[41] Florida N. R. Co. v. Southern Supply Co., 112 Ga. 1; 37 S. E. 130.

[42] United Real Estate Co. v. McDonald, 140 Mo. 605; 41 S. W. 913.

[43] Ironton Land Co. v. Butchart, 73 Minn. 39; 75 N. W. 749; 3 Chic. L. J. Wkly. 314.

[44] McConaghy v. Pemberton, 168 Pa. St. 121; 31 Atl. 996.

a sewer so that it will not overflow certain premises at high water, the owner of such premises may recover expenses incurred in pumping out the water by which the damage to his property is diminished.[45]

§ 1399. Government contracts.—The wages of unemployed men which are paid by the contractor may be recovered from the government where it unreasonably neglects to furnish the contractor with brick and marble for the building as agreed.[46] And where a contractor for the construction of a lighthouse is not supplied with the metal work as agreed in the contract, within a reasonable time, he may recover from the government for such losses as he has sustained by reason of the increased price of labor, for such materials as he has lost by delay, for necessary traveling expenses incurred by him, for the cost of protecting his plant from the elements, and for interest on delayed payments, but it has been decided that there can be no recovery for the value of his services and of the plant during such delay where the loss of profits which he might have made on other contracts if he had not been prevented from taking them by the delay is the only element of such damage.[47] And a contractor who is engaged in the construction of a monitor may recover items of damage sustained by him which are the proximate result of the acts of the government.[48]

§ 1400. Breach of contract to award subcontract.—For the breach of a contract to award part of the work to a subcontractor there may be a recovery, as damages, of the profits which he would have made upon such portion, and also, it is decided, of the expenses of delay after the time when he was to have commenced work under the contract and before he was notified that it was at an end.[49]

[45] Nashville v. Sutherland, 94 Tenn. 356; 29 S. W. 228.

[46] Bitting v. United States, 25 Ct. Cl. 502.

[47] Langford v. United States, 95 Fed. 933, distinguishing United States v. Behan, 110 U. S. 338; 28 L. Ed. 168, and disapproving Kelly v. United States, 31 Ct. Cl. 361.

[48] Myerle v. United States, 33 Ct. Cl. 1.

[49] Hammond v. Beason, 112 Mo. 190; 20 S. W. 474.

CHAPTER LVI.

TELEGRAPH AND TELEPHONE COMPANIES.

§ 1401. Damages reasonably in contemplation — Hadley v. Baxendale rule—Breach of contract.
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§ 1401. Damages reasonably in contemplation—Hadley v. Baxendale rule—Breach of contract.—Where two parties have

entered into a contract, which one of them has broken, the damages which the other ought to receive in respect to such breach of contract should be such as may fairly and reasonably be considered, as either arising naturally—that is, according to the usual course of things—from such breach of contract itself, or such as may reasonably be supposed to have been in the contemplation of both parties at the time they made the contract, as the probable result of a breach of it. This is the rule declared by Baron Alderson in the leading English case of Hadley v. Baxendale,[1] for determining the measure of damages due to a breach of contract, and has been generally accepted and followed by the courts, both in England and the United States; and this rule has been generally applied in actions to recover damages for breach of contract to transmit or deliver telegraph messages.[2]

§ 1402. Actions for tort—Negligence as to telegrams.—In actions for tort the rule is much broader. Damages in such cases being recoverable, not only for such injurious consequences as proceed immediately from the cause which is the basis of the action, but also consequential damages, and those damages are not limited so far as they are compensatory, by what was in fact contemplated by the party in fault. The compensation must be commensurate with the loss or injury.[3] It is also said in the last cited case that this rule also applies to actions against telegraph companies for negligence in the per-

[1] 9 Exch. 353.

[2] Western Un. Teleg. Co. v. Hall, 124 U. S. 444; 2 Am. Elec. Cas. 868; Frazer v. Western Un. Teleg. Co., 84 Ala. 487; 2 Am. Elec. Cas. 469; Western Un. Teleg. Co. v. Short, 53 Ark. 434; 3 Am. Elec. Cas. 592; Western Un. Teleg. Co. v. Valentine, 18 Ill. App. 57; 1 Am. Elec. Cas. 829; Western Un. Teleg. Co. v. Martin, 9 Ill. App. 587; 1 Am. Elec. Cas. 378; Garrett v. Western Un. Teleg. Co., 83 Iowa, 257; 3 Am. Elec. Cas. 657; Western Un. Teleg. Co. v. Jump (Ky. 1886), 8 Ky. L. Repr. 531; First Nat. Bank v. Telegraph Co., 30 Ohio St. 555; 27 Am. Rep. 485; Bowen v. Lake Erie Teleg. Co. (Ct. Com. Pl. Ohio, 1853), Allen's Teleg. Cas. 7; 1 Am. L. Reg. 685; Western Un. Teleg. Co. v. Edsall, 63 Tex. 668; 1 Am. Elec. Cas. 715; Western Un. Teleg. Co. v. Smith (Tex. Civ. App. 1894), 26 S. W. 216; 4 Am. Elec. Cas. 812; Stevenson v. Montreal Teleg. Co., 16 Up. Can. Q. B. Rep. 530; Allen's Teleg. Cas. 71. See also cases cited in the following sections and generally throughout this chapter.

[3] Mentzer v. Western Un. Teleg. Co., 93 Iowa, 752; 62 N. W. 1; 5 Am. Elec. Cas. 709, 716, per Deemer, J.

formance of their duties. This question, however, whether the action for the recovery of damages in the cases last mentioned is one in contract or tort is involved in the discussion in the different decisions hereinafter cited, of the question of recovery of damages for mental suffering.

§ 1403. Communication of special circumstances—Hadley v. Baxendale—Applied to telegraph messages.—In the case of Hadley v. Baxendale,[4] in connection with the rule given in the preceding section, it was also declared by Baron Alderson that if special circumstances, under which a contract was made, "were communicated by the plaintiffs to the defendants, and thus known to both parties, the damages resulting from the breach of such contract, which they would reasonably contemplate, would be the amount of injury which would ordinarily follow from a breach of contract under the special circumstances so known and communicated. But, on the other hand, if these special circumstances were wholly unknown to the party breaking the contract, he, at the most, could only be supposed to have had in contemplation the amount of injury which would arise generally, and in the great multitude of cases not affected by any special circumstances, from such a breach of contract." This latter principle has also been applied in determining the extent of the liability of a telegraph company for delay or failure to transmit or deliver a despatch. If notice is given to the company of the importance of a message and of the results likely to follow from delay and delivery, then the company, being informed of such special circumstances, will be liable under the special circumstances so known and communicated. If, however, no special notice is given to the company of any particular facts or circumstances affecting the measure of damages, aside from the contents of the message, the question of the extent of the company's liability must be determined from the facts of each case, dependent upon whether the message itself could reasonably be construed as conveying to the company knowledge of its special importance, and whether from such language the company could have reasonably contemplated that the results claimed to have followed, owing to its breach of contract,

[4] 9 Exch. 353.

would follow. As a general rule, if the sender of a despatch does not notify the company of its importance or of special damages, which may result from a breach by the telegraph company of its contract to transmit and deliver, and the message does not, from its language, convey to the company any such knowledge, only such damages may be recovered as could have been reasonably anticipated from the language of the message, and there can be no recovery for damages arising out of such special circumstances.[5] This rule, however, is not to be con-

[5] Behm v. Western Un. Teleg. Co., 8 Biss. (U. S. C. C. 1878) 131; Western Un. Teleg. Co. v. Coggin, 68 Fed. 137; Pacific Postal Teleg. Cable Co. v. Fleischner (U. S. C. C. A. 1895), 5 Am. Elec. Cas. 840; Cahn v. Western Un. Teleg. Co., 48 Fed. 810; 3 Am. Elec. Cas. 824; Western Un. Teleg. Co. v. Way, 83 Ala. 542; 2 Am. Elec. Cas. 467; Western Un. Teleg. Co. v. Hines, 96 Ga. 688; 51 Am. St. Rep. 159; Pope v. Western Un. Teleg. Co., 14 Ill. App. 531; 1 Am. Elec. Cas. 615; Postal Teleg. Cable Co. v. Lathrop, 131 Ill. 575; 3 Am. Elec. Cas. 630; Western Un. Teleg. Co. v. Harris, 19 Ill. App. 347; 1 Am. Elec. Cas. 839; Hadley v. Western Union Teleg. Co., 115 Ind. 191; 2 Am. Elec. Cas. 542; Bierhaus v. Western Un. Teleg. Co., 8 Ind. App. 246; 4 Am. Elec. Cas. 713; Evans v. Western Un. Teleg. Co., 102 Iowa, 219; 71 N. W. 219; 3 Am. Neg. Rep. 160; Garrett v. Western Un. Teleg. Co., 83 Iowa, 257; 3 Am. Elec. Cas. 657; Herron v. Western Un. Teleg. Co. (Iowa, 1894), 57 N. W. 696; 4 Am. Elec. Cas. 731; Shields v. Washington Teleg. Co. (5th Dist. Ct. of New Orleans), Allen's Teleg. Cas. 5, 9; Wkly. L. Jour. 283; Beaupré v. Pacific & Atl. Teleg. Co., 21 Minn. 155; 1 Am. Elec. Cas. 141; Nelson v. Western Un. Teleg. Co., 2 Mo. App. 1327; Western Un. Teleg. Co. v. Lowery, 32 Neb. 732; 3 Am. Elec. Cas. 717; Mackay v. Western Un. Teleg. Co., 16 Nev. 222; 1 Am. Elec. Cas. 362; Baldwin v. United States Teleg. Co., 45 N. Y. 744; 6 Am. Rep. 165; Mowry v. Western Un. Teleg. Co., 51 Hun (N. Y.), 126; 2 Am. Elec. Cas. 683; McColl v. Western Un. Teleg. Co., 7 Alb. N. C. (N. Y.) 151; 1 Am. Elec. Cas. 280; Telegraph Co. v. Griswold, 37 Ohio St. 301; 1 Am. Elec. Cas. 329; United Teleg. Co. v. Wenger, 55 Penn. St. 262; Allen's Teleg. Cas. 356; Western Un. Teleg. Co. v. Landis (Pa. 1887), 21 W. N. Cas. 38; 2 Am. Elec. Cas. 720; Pepper v. Western Un. Teleg. Co., 87 Tenn. 554; 2 Am. Elec. Cas. 756; Thompson v. Western Un. Teleg. Co., 64 Wis. 531; 1 Am. Elec. Cas. 772; Western Union Teleg. Co. v. Gossett, 15 Tex. Civ. App. 52; 38 S. W. 536; 6 Am. Elec. Cas. 847; Western Un. Teleg. Co. v. Nagle, 11 Tex. Civ. App. 539; 6 Am. Elec. Cas. 842; Erie Teleg. & Teleph. Co. v. Grimes, 82 Tex. 89; Western Un. Teleg. Co. v. Carver, 15 Tex. Civ. App. 547; 39 S. W. 1021; 2 Am. Neg. Rep. 471; Houston E. & W. T. Ry. Teleg. Co. v. Davidson, 15 Tex. Civ. App. 334; 39 S. W. 605; 2 Am. Neg. Rep. 251; Western Un. Teleg. Co. v. Williford, 2 Tex. Civ. App. 574; Gulf, C. & S. F. R. Co. v. Loonie, 82 Tex. 323. But see Western Un. Teleg. Co. v. Reynolds, 77 Va. 173; 1 Am. Elec. Cas. 487, 505; Rittenhouse v. Independent

strued as meaning that all the details in reference to a transaction referred to in a despatch and which are known to the parties themselves, need be disclosed to the company to render it liable for more than nominal damages.[6] In this connection it is said in one case: "We think the reasonable rule, and one well sustained by authority, is that where a message as written, read in the light of well known usage in commercial correspondence, reasonably informs the operator that the message is one of business importance and discloses the transaction so far as is necessary to accomplish the purpose for which it is sent, the company should be held liable for all the direct damages resulting from a negligent failure to transmit it as written, within a reasonable time, unless such negligence is in some way excused."[7]

§ 1404. Communication of special circumstances—Sufficient notice—Illustrations.—A despatch by an agent to the owner of a cattle ranch that "Water is getting low, come out," is sufficient notice to the company of the importance and urgency of the message.[8] As is also a despatch, "You had better come and attend to your claim at once," sent by a bank to a firm of merchants.[9] And a message reading "Is stonework on building finished? Wire answer to-day. Henley Stone Company," informs the company that the sender is engaged in the stone business and is interested in and desirous of information as to

Line of Teleg., 1 Daly (N. Y.), 474; 44 N. Y. 263; Allen's Teleg. Cas. 570. See cases throughout this chapter, as to company being sufficiently notified as to importance and character of message.

[6] Postal Teleg. Cable Co. v. Lathrop, 131 Ill. 575; 3 Am. Elec. Cas. 630; Evans v. Western Un. Teleg. Co., 102 Iowa, 219; 71 N. W. 49; 3 Am. Neg. Rep. 160.

[7] Postal Teleg. Cable Co. v. Lathrop, 131 Ill. 575; 3 Am. Elec. Cas. 630, per Mr. Justice Wilkin. See also Evans v. Western Un. Teleg. Co., 102 Iowa, 219; 71 N. W. 219; 3 Am. Neg. Rep. 160; Garrett v. Western Un. Teleg. Co., 83 Iowa, 257; 3 Am. Elec. Cas. 657; Western Un. Teleg. Co. v. Harris, 19 Ill. App. 347; 1 Am. Elec. Cas. 839; Bierhaus v. Western Un. Teleg. Co., 8 Ind. App. 246; 4 Am. Elec. Cas. 708; Mowry v. Western Un. Teleg. Co., 51 Hun (N. Y.), 126; 20 N. Y. St. R. 626; 5 N. Y. Supp. 952; 2 Am. Elec. Cas. 679; Western Un. Teleg. Co. v. Wofford (Tex. Civ. App.), 42 S. W. 119.

[8] Mitchell v. Western Un. Teleg. Co., 5 Tex. Civ. App. 427; 4 Am. Elec. Cas. 811.

[9] Western Un. Teleg. Co. v. Sheffield, 71 Tex. 570; 2 Am. Elec. Cas. 802.

the progress of the work concerning which inquiry is made, and in case of failure to deliver the message there may be a recovery of the expenses incurred in going to the place named to get the information asked for in the telegram.[10] So a despatch, "Have you claim against P. L. D.? Answer how much," and the reply, "Yes, one hundred and sixty-one dollars and fifteen cents," is sufficient notice to the company to charge it with special damages for failure to promptly deliver.[11] And a message as follows: "One dollar fifty, freight thirteen cents. Answer quick," was held to sufficiently disclose to the company the fact that it related to an important business transaction.[12] As was also a message in the words: "Cover two hundred September and two hundred August." In transmission there was an error, and the message as delivered to the addresses read: "Cover two hundred September and one hundred August," and it was held that the company was liable for the full amount of damage suffered by reason of the error.[13] So again where, in reply to a telegram stating the price of "pickled hams sixteen," the following message was presented for transmission on the same day: "Will take two cars sixteen. Ship as soon as convenient, via West Shore," the company was held to be sufficiently apprised of the importance of the message and that its delay might cause loss.[14] And a message stating that a certain person thinks he can make a "trade," is sufficient notice to the company to render it liable for damages resulting to such person in relation to the trade, caused by the failure of the company to deliver the telegram.[15] In another case direct notice was given to the company that the sender wanted the addressee to bring a dog to assist him in driving sheep to a ranch from another county. The message as given for transmission read: "Meet me immediately with two horses at Buffalo Springs. Bring

[10] Western Un. Teleg. v. Henley (Ind.), 60 N. E. 682.

[11] Bierhaus v. Western Un. Teleg. Co., 8 Ind. App. 246; 4 Am. Elec. Cas. 708.

[12] Dixon v. Western Un. Teleg. Co., 3 N. Y. App. Div. 60; 38 N. Y. Supp. 1056.

[13] Western Un. Teleg. Co. v. Blanchard, 68 Ga. 299; 45 Am. Rep. 480; 1 Am. Elec. Cas. 404.

[14] Mowry v. Western Un. Teleg. Co., 51 Hun (N. Y.), 126; 2 Am. Elec. Cas. 679.

[15] Western Un. Teleg. Co. v. Morrison (Tex. Civ. App.), 33 S. W. 1025.

Shep." Shep was the name of the dog, and in transmission the word "Shep" was changed to "sheep." As a result of the message the addressee drove a large flock of sheep to the designated place, many of which perished from exposure. Part of the other flock for which the sender wished the assistance of the dog in driving also perished. It was held that sufficient notice was given to the company, and that it was liable for the actual loss.[16] Again, a message directing that horses be sent to a designated place sufficiently apprises the company that if it fails to transmit or deliver such message damage may result.[17]

§ 1405. Communication of special circumstances—Insufficient notice—Illustrations.—In an early case in New York it appeared that the following message had been given to the telegraph company for transmission and delivery, "Get ten thousand dollars of the Mail Company." This message the company delayed delivery of. The money was desired in order to carry out a contract to purchase pistols of a third party. Owing to the failure to deliver the message in time and consequently to get the money, it was impossible to fulfill the contract, and plaintiff became subject to a penalty, and also lost certain commissions which they would have been entitled to if the contract had been consummated. It was held that there could be no recovery for the penalty or loss of commission, since such damages could not have been reasonably contemplated as a result of failure to deliver.[18] In another early case in Maryland, a message was given to a telegraph company for transmission and delivery, which simply read, "Sell fifty gold." It was alleged that this was an order to brokers to sell $50,000 of gold, that it would have been so understood among brokers, and that such a sale would have been made if the message had been transmitted and delivered. It was held, however, that unless information was given to the company that such was the meaning of the words used, there could be no recovery for loss sustained by reason of failure to make such sale, though caused by the negligence of the com-

[16] Western Un. Teleg. Co. v. Edsall, 74 Tex. 329; 2 Am. Elec. Cas. 828.

[17] Evans v. Western Un. Teleg. Co., 102 Iowa, 219; 71 N. W. 219; 3 Am. Neg. Rep. 160.

[18] Landsberger v. Magnetic Teleg. Co., 32 Barb. (N. Y.) 530; Allen's Teleg. Cas. 165.

pany in failing to transmit and deliver such message.[19] Where a message addressed to a lienor and reading: "If possible come to S. in the morning," was given to a telegraph company for transmission and delivery, and such lienor's consent was necessary to consummate a sale, and the company failed to deliver the despatch, and the sale was not consummated, owing to the nonconsent of the lienor, who was absent, it was held that the company was not liable for the loss of the sale, where no information was given to the company other than that disclosed by the message itself, of its importance or purpose.[20]

§ 1406. Cipher despatches.—If a message in cipher is received by a telegraph company for transmission and delivery, and such message is unintelligible to the company, and it has no knowledge of its meaning, or importance, and no notice thereof is given, the general rule is that the company's liability will be limited to the amount received for transmission.[21] In reference to this class of message, it is said in one case: "If the sender choose to speak in unintelligible language to those who are to pass it over the wires, it is due to the company, if it is to be held responsible for serious damages, that the information of

[19] United States Teleg. Co. v. Gildersleeve, 29 Md. 232; Allen's Teleg. Cas. 390.

[20] Nelson v. Western Un. Teleg. Co., 2 Mo. App. Rep. 1327; 72 Mo. App. Ill. 111.

[21] Western Un. Teleg. Co. v. Wilson, 32 Fla. 527; 4 Am. Elec. Cas. 664, overruling Western Un. Teleg. Co. v. Hyer, 22 Fla. 637; 2 Am. Elec. Cas. 484; Western Un. Teleg. Co. v. Martin, 9 Ill. App. 587; 1 Am. Elec. Cas. 378; Abeles v. Western Un. Teleg. Co., 37 Mo. App. 544; Mackey v. Western Un. Teleg. Co., 16 Nev. 222; 1 Am. Elec. Cas. 362; Cannon v. Western Un. Teleg. Co., 100 N. C. 300; 2 Am. Elec. Cas. 703; Ferguson v. Anglo-American Teleg. Co., 178 Penn. St. 377; 6 Am. Elec. Cas. 819; Hill v. Western Un. Teleg. Co., 42 S. C. 367; 5 Am. Elec. Cas. 775; Daniel v. Western Un. Teleg. Co., 61 Tex. 452; 48 Am. Rep. 305; Houston, East & West Tex. Ry. Teleg. Co. v. Davidson (Tex. Civ. App. 1897), 2 Am. Neg. Rep. 251; Candee v. Western Un. Teleg. Co., 34 Wis. 471; 17 Am. Rep. 452; 1 Am. Elec. Cas. 99; Primrose v. Western Un. Teleg Co., 154 U. S. 1; 14 Sup. Ct. 1098; 38 L. Ed. 883; 5 Am. Elec. Cas. 809; Behm v. Western Un. Teleg. Co., 8 Biss. (N. S.) 131; Sanders v. Stuart, 1 Com. Pl. Div. 326. But see Western Un. Teleg. Co. v. Way, 83 Ala. 542; 2 Am. Elec. Cas. 456; American Un. Teleg. Co. v. Daughtery, 89 Ala. 191; 3 Am. Elec. Cas. 579; Western Un. Teleg. Co. v. Fatman, 73 Ga. 285; 1 Am. Elec. Cas. 666; Fererro v. Western Un. Teleg. Co., 9 App. (D. C.) 455; 24 Wash. L. Repr. 790; 35 L. R. A. 548.

its importance should be given to the sending operator, in order that he may communicate it to an intervening agency employed in forwarding, and thereby diligence and care be secured from each."[22] And a request by the sender of a cipher despatch, that it be sent promptly so as to arrive if possible, "before the cotton market opened," was held not sufficient notice to the operator of the importance of the message so as to render the company liable for a short delay, in the absence of gross negligence.[23] But where the sender of a cipher despatch told the agent that it was very important and to get an answer by wire as soon as possible, and the agent, although he did not know the contents knew that the message related to a particular transaction and the despatch was marked "rush," it was held that the company was liable for special damages for failure to transmit.[24]

§ 1407. Market value—Damages measured by changes in.—Where, owing to the negligence of a telegraph company in the erroneous transmission of a message, or by delay in, or failure to deliver the same, the sender or addressee has suffered loss in reference to the purchase or sale of property, changes in the market value of such property are an element to be considered in ascertaining the measure of damages. This general principle or rule is illustrated in the following sections by special applications or adaptations thereof to various particular classes of cases, each being subject to the fundamental principle above stated, and the rule itself only being varied so far as to adapt it to the special facts in each class of cases.[25]

§ 1408. Stock transactions—Rule—Illustrations.—Owing to fluctuations in the value of stocks, creating the necessity of quick communication between the buyer or seller and the broker, or others, in order to complete transaction at a profit, or to save loss of further money, the telegraph is used as a means of communication between such persons. In such cases where a message is received by a telegraph company for trans-

[22] Cannon v. Western Un. Teleg. Co., 100 N. C. 300; 6 Am. St. Rep. 590; 6 S. E. 731; 2 Am. Elec. Cas. 703, per Smith, Ch. J.

[23] Cannon v. Western Un. Teleg. Co., 100 N. C. 300; 6 S. E. 731; 2 Am. Elec. Cas. 699; 6 Am. St. Rep. 590.

[24] Western Un. Teleg. Co. v. Nagle, 11 Tex. Civ. App. 539; 32 S. W. 707.

[25] See secs. 1411-1426, herein.

mission and delivery, which shows upon its face that it relates to a stock transaction, and is either an order to buy or sell shares of stock at a certain time, or at a certain figure, the company will be considered as having knowledge of its importance, and may be liable for loss of profits or other losses which might have been reasonably contemplated, and which are caused by the failure of the company to transmit or deliver. So where a message reading as follows: "T. W. Pearsall & Co., Mills Building, New York City. Buy one thousand Western Union Telegraph, T. W. Pearsall" was given to the company for transmission, but as transmitted and received the address was changed to "T. W. Pearsall, Mills Building, N. Y." and the latter, who had sent the message being absent from his office, the message was not opened until the following day, when shares ordered sold for seventeen hundred dollars more than they did on the morning before, it was held that the company was liable for the difference between the market value of the shares at the time when the despatch should have been delivered, and the sum paid for them in the market on the receipt of the message.[26] But, where a message for transmission to brokers directed them to "Buy one thousand shares," and in transmission the word "hundred" was substituted for "thousand," and the brokers bought one hundred shares, it was held that the sender who had knowledge of the error and purchase on the following day, but remained inactive for several days before directing the brokers to purchase the balance, could not recover for the difference in value of the nine hundred shares, between the day upon which he had knowledge of this error, and the day he purchased the stock, but that he could only recover for the difference in value between the day of the purchase of the one hundred shares and the following day when he had knowledge of the error and could have remedied the mistake.[27] In another case a message, as delivered to a telegraph company, read: "If we have any Old Southern sell same

[26] Pearsall v. Western Un. Teleg. Co., 124 N. Y. 256; 35 N. Y. St. R. 307; 26 N. E. 534; 3 Am. Elec. Cas. 724. See also United States Teleg. Co. v. Wanger, 55 Penn. St. 262; Allen's Teleg. Cas. 356.

[27] Marr v. Western Un. Teleg. Co., 85 Tenn. 529; 3 S. W. 490; 16 Am. & Eng. Corp. Cas. 243; 2 Am. Elec. Cas. 720.

before board. Buy five Hudson at board," but the message, as transmitted, read: "If we have any Old Southern sell same before board. Buy five hundred at board." Plaintiff's agent, who received the message, bought five hundred Old Southern, but plaintiff hearing of this immediately directed the sale thereof and the purchase of five hundred shares of Hudson River, according to the intention of the original message as delivered. In the meantime Hudson River had risen making a difference to plaintiff of thirteen hundred and seventy-five dollars. In an action against the company for damages, it was held that the plaintiff could recover, and that the measure of damages was the raise in the price of stock.[28] As to the losses sustained by the purchase and sale of the Old Southern, it was held that the stock was in legal effect purchased on defendant's account, and could not be sold without some notice to them, and no notice having been given, there could be no recovery, since, by having sold the stock without notice, plaintiff must be considered as having adopted the purchase. In a case in Illinois a message conditioned against liability for error or delay, if unrepeated, directed the sale of one hundred shares of stock. The hundred was changed to one thousand in transmission. It was held that the measure of damages was the amount paid by plaintiff by reason of an advance in price of stock, to replace the excess of nine hundred shares sold in obedience to the erroneous message.[29] In a case in Arkansas, however, it is held that the fact that stock advanced in value shortly after the message was sent, and remained so until after the trial, does not entitle the sender to special damages, in an action against the company for failure to deliver the message, in the absence of proof that if the stock had been purchased it would have been sold at a profit.[30] If a message directs the sender to sell shares of stock, which the sender does not possess, and there is no order to buy coupled with the order to sell, damages for the loss of contemplated profits, caused by the delay of the

[28] Rittenhouse v. Independent Line of Teleg., 44 N. Y. 263; 4 Am. Rep. 673; Allen's Teleg. Cas. 570.

[29] Tyler v. Western Un. Teleg. Co., 60 Ill. 421; 14 Am. Rep. 38; 1 Am. Elec. Cas. 14.

[30] Western Un. Teleg. Co. v. Fellner, 58 Ark. 29. See Hughes v. Western Un. Teleg. Co. (N. C. 1894), 19 S. E. 100.

telegraph company to transmit and deliver, are too remote and speculative to be recovered.[31]

§ 1409. Dealing in option futures—Illegality as affecting damages.—In a case in Georgia, which was an action to recover damages for error in transmitting a message relating to option futures, it was contended that the measure of such damages was to be determined by changes in market values. The court, however, held that contracts relating to futures being illegal in that state, damages based on damages in market value could not be recovered in such case. It was said by the court: "We think this standard cannot be invoked for the reason that contracts relating to 'futures' are illegal and we do not see how an illegal contract can be called in to measure of damages sustained by reason of a breach of a legal contract. It is true that according to the Telegraph Company v. Blanchard, 68 Ga. 299, a recovery in this case might be had, but that decision was made at a time when contracts between brokers and their principals were considered obligatory, notwithstanding the vitiating element of speculative 'futures,' but since the case of Bank v. Cunningham, 75 Ga. 366, the principle of the former case has stood virtually overruled. Besides, the question in 68 Ga. related to a broker in the state of New York, whereas the broker in this case was located in this state. His contract with the principal was a Georgia contract."[32]

§ 1410. Future or speculative profits.—As a general rule, a party who is injured by a breach of the contract, may recover, as damages, gains prevented, as well as losses sustained, provided they are certain, and such as might be expected to follow the breach.[33] This rule is applied in action to recover damages for failure to deliver telegraph messages. In such cases, contemplated or speculative profits, based upon a mere opportunity or chance of profits, as a result of a possible future sale

[31] Cahn v. Western Un. Teleg. Co., 48 Fed. 810; 3 Am. Elec. Cas. 824.

[32] Cothran v. Western Un. Teleg. Co., 83 Ga. 25; 2 Am. Elec. Cas. 496, per Bleckley, Ch. J., citing Melchert v. Am. Un. Teleg. Co., 11 Fed. 193, and notes.

[33] Western Un. Teleg. Co. v. Wilhelm, 48 Neb. 910; 67 N. W. 870; 4 Am. & Eng. Corp. Cas. (N. S.) 233; Beaupré v. Pacific & Atl. Teleg. Co., 21 Minn. 155; 1 Am. Elec. Cas. 141.

of goods or property, cannot be recovered.[34] So in an action against a telegraph company for damages for the nondelivery of a telegram, requesting oil to be supplied "as soon as possible," it was held that the plaintiff might recover the cost of the message, the advance in the price of freight, and his expenses incurred by reason of the failure to deliver the message, but not the profit that he might have made on the oil had the message been delivered and the oil sent in due time.[35] And where a message directed a broker to purchase a certain quantity of petroleum if he thought "it safe," and on the day on which the message should have been delivered, oil could have been bought at $1.17 per barrel, but on the next day it advanced to $1.35 per barrel, at which figure the broker did not purchase, and in fact no purchase was made, it was held that as it did not appear that the sender intended to purchase oil to resell at a profit, or that if the message had been delivered promptly, and the purchase made, he would have resold at a profit on the following day, or that he would have resold at a profit on any subsequent day, only nominal damages could be recovered.[36] Again, where in an action for failure to deliver a telegram, it appeared that the message if delivered only gave the plaintiff an opportunity to make a contract for work, and that if the contract had been made the profits thereon would have been subject to several contingencies, the damages for such failure are too remote and uncertain to permit of recovery.[37] The court said in this case: "We think the damages here sued for are too remote to be recovered. If the telegram had been received it only gave appellant an opportunity for making a contract for railroad work which he might have made or might not have made, and if he had made a contract for work, what he should have made thereon would

[34] Western Un. Teleg. Co. v. Hall, 124 U. S. 444; 2 Am. Elec. Cas. 868; Western Un. Teleg. Co. v. Graham, 1 Colo. 230; 9 Am. Rep. 136; Postal Teleg. Cable Co. v. Barwise, 11 Colo. App. 338; 53 Pac. 252; Clay v. Western Un. Teleg. Co., 81 La. 285; 2 Am. Elec. Cas. 492; Rich Grain Distilling Co. v. Western Un. Teleg. Co. (Ky. Super. Ct. 1891), 13 Ky. L. Repr. 256; Cannon v. Western Un. Teleg. Co., 100 N. C. 300; 2 Am. Elec. Cas. 699; Hubbard v. Western Un. Teleg. Co., 33 Wis. 558; 14 Am. Rep. 775; Lane v. Montreal Teleg. Co., 7 N. C. C. P. 23; Allen's Teleg. Cas. 61.

[35] Western Un. Teleg. Co. v. Graham, 1 Colo. 230; 9 Am. Rep. 136.

[36] Western Un. Teleg. Co. v. Hall, 124 U. S. 444; 2 Am. Elec. Cas. 868.

[37] Johnson v. Western Un. Teleg. Co. (Miss.), 29 So. 787.

have been subject to several contingencies. In other words, the damages there claimed are not the direct result of the breach of duty complained of. They do not naturally or necessarily or probably arise from the wrong done, and because the damages claimed are remote and uncertain, the appellant may not recover."[38] But the profits lost by failure to receive goods ordered by telegraph, by one who has resold them before sending the order, are not too remote to be recovered in an action against the telegraph company for negligently failing to transmit the message containing the order.[39]

§ 1411. Acceptance of offer to sell—Recovery by sender of message—Market value—Measure of damages.—If a telegraph company by its negligence in delaying the delivering of a message, which is an acceptance of an offer to sell at a certain price, causes to the sender a loss of the benefits of such offer, the company will be liable in damages to him for such additional sum as he may be obliged to pay at the same place by due diligence, for the same quantity and quality, after notice of the failure to deliver the telegram.[40] Thus it was so held where a person, having received an offer of a cargo of corn at ninety cents a bushel, delivered to defendant, a telegraph company, for transmission, a message in reply to the offer, in these words: "Ship cargo named at ninety, if you can secure freight at ten- wire us the result," the message was sent but was not delivered, by reason whereof the sender failed to obtain the corn at the terms offered, and the price of corn and freight having advanced, plaintiff was compelled to purchase at high terms.[41] In another case, where a telegraph company delayed the delivery of a despatch sent by members of a firm to another member, instructing him to close an option for the purchase of cattle, and by the delay the option was lost, the company was held liable for the difference between the contract price and the

[38] Per Terral, J.

[39] Walden v. Western Un. Teleg. Co., 105 Ga. 275; 31 S. E. 172.

[40] True v. International Teleg. Co., 60 Me. 9; 11 Am. Rep. 156; Allen's Teleg. Cas. 530; Squire v. Western Un. Teleg. Co., 98 Mass. 232; Allen's Teleg. Cas. 372; Western Un. Teleg. Co. v. Carver, 15 Tex. Civ. App. 547; 39 S. W. 1021; 2 Am. Neg. Rep. 471.

[41] True v. International Teleg. Co., 60 Me. 9; 11 Am. Rep. 156; Allen's Teleg. Cas. 530.

market value of cattle of the same grade, at the place where the option was to be performed in the day of its expiration, if cattle of that grade could have been obtained in the market at that time. And it was held that the fact that there was subsequently an increase in the market value of such cattle, by which, if the purchase had been made, a profit would have resulted, did not affect the measure of damages.[42]

§ 1412. Offer to buy—Message accepting—Loss of profits—Market value.—If owing to the failure of a telegraph company to deliver a message sent in response to an offer to buy property at a certain figure and as an acceptance thereof, there is a loss of the sale and a consequent loss of profits to the sender of the message, the company will be liable for the loss so sustained.[43]

§ 1413. Offer to buy—Failure to deliver message containing—Loss of sale—Market value.—If a telegraph company fails to deliver a message containing an offer to buy property owned by the addressee, at a certain specified figure, and, as a result of the failure to deliver, the addressee loses the sale, the company will be liable for the difference between the lost offer and the market value of the property at the same time and place, or in case there is no special market value to the property, the measure of damages will be the difference between the lost offer and the price obtained therefor by reasonable effort to recover the best price obtainable. Thus where a person, by the failure of the telegraph company to deliver a message, lost an opportunity to sell a carload of mules at one hundred dollars per head, and was forced to keep them for a period of three months at considerable expense, when he sold them for seventy-seven dollars and fifty-one cents per head, it was held that the company would be liable for the difference between the selling price and that offered, together with cost of keeping them.[44] So in another case, where the addressee of a message containing an offer for

[42] Breuster v. Western Un. Teleg. Co., 65 Ark. 537; 47 S. W. 560. See also Western Un. Teleg. Co. v. Carver, 15 Tex. Civ. App. 547; 39 S. W. 1021.

[43] Western Un. Teleg. Co. v. Nagle, 11 Tex. Civ. App. 539; 6 Am. Elec. Cas. 842.

[44] Wallingford v. Western Un. Teleg. Co., 53 S. C. 410; 31 S. E. 275.

a horse which had no fixed market value lost the sale owing to the delay on the part of the telegraph company to deliver the message, it was held that he was entitled to recover from the company the difference between the price offered and that obtained subsequently, after the use of reasonable and diligent efforts to sell at the best price obtainable, together with cost of keeping and interest.[45]

§ 1414. Offer to sell—Failure to deliver message—Subsequent rise in price—Market value.—If a telegraph company, either by error in transmission or delay in delivery of a despatch containing an offer to sell certain specified property at a fixed price causes a loss to the addressee of the opportunity to purchase the property specified in the message, his measure of damages will be the excess of the market value at the same place of the article or articles offered over the price at which they were offered in the message.[46]

§ 1415. Offer to sell—Error in message—Price understated—Market value.—If, in a message containing an offer to sell goods or property at a certain price the company in transmission erroneously understates the price, and in reliance thereon the addressee sells or makes a binding contract to sell such goods or property at a price less than stated in the despatch, the company will be liable in damages for the difference between the price at which they were sold and the price fixed in the message.[47] And if the message specifying the price is erroneously transmitted so that the price on the message delivered is less than that on the one given to the company for transmission and the offer as contained in the delivered message is accepted and the sale made, the telegraph company will be liable for the difference between the two prices.[48] Where, however, the seller forwarded

[45] Huron v. Western Un. Teleg. Co. (Iowa, 1894), 57 N. W. 696; 4 Am. Elec. Cas. 731.

[46] Pennington v. Western Un. Teleg. Co., 67 Iowa, 631; 1 Am. Elec. Cas. 834.

[47] Western Un. Teleg. Co. v. Crawford, 110 Ala. 460; 20 So. 111; 4 Am. & Eng. Corp. Cas. (N. S.) 230. See also Western Un. Teleg. Co. v. Landis (Penn.), 12 Atl. 467; 2 Am. Elec. Cas. 716; Western Un. Teleg. Co. v. Shotter, 71 Ga. 760; 1 Am. Elec. Cas. 557; Pegram v. Western Un. Teleg. Co., 100 N. C. 128; 2 Am. Elec. Cas. 790.

[48] Ayer v. Western Un. Teleg. Co.,

the goods before learning of the mistake and refused to correct the draft for the price, which was attached to the bill of lading, and the goods being attached by the buyer were allowed to depreciate in value, the seller was permitted to recover the difference between the price for which he offered to sell the goods and the price for which they could have been sold in the market where they were after the mistake was discovered, with no allowance for depreciation, as this could have been avoided by replevying the goods and selling them promptly.[49]

§ 1416. Offer to buy—Error in transmission—Price understated.—If in an offer to buy goods by telegraph, the company makes an error in the transmission of the message, so that in the message as delivered to the addressee the price is in excess of that in the message given to the company for transmission, and the addressee, in the absence of negligence, in reliance upon the price stated, having entered into contracts for purchase and having purchased goods of the character referred to at a price in excess of that actually offered, the company will be liable for the loss, the measure of damages being the difference between the price stated in the message given to the company for transmission and that paid by such person for the goods purchased by him, together with the expense and cost of shipment.[50]

§ 1417. Message ordering goods—Error in transmission—Quantity increased—Market value.—If a telegraph company in the transmission of a message ordering goods to be sent from one place to another, erroneously makes the message appear to be an order for a larger quantity than it in fact is, and the addressee in reliance thereon sends the quantity called for by the erroneous message, the company will be liable in damages for the difference in the market value of the goods at

79 Me. 493; 1 Am. St. Rep. 353; 2 Am. Elec. Cas. 601.

[49] Postal Teleg. Cable Co. v. Schaefer (Ky. 1901), 62 S. W. 1119; 23 Ky. Law Rep. 344.

[50] Western Un. Teleg. Co. v. Richman (Penn. Sup. Ct. 1897), 19 W. N. Cas. 569; 2 Am. Elec. Cas. 710. See also De Rutte v. N. Y. Alb. & Buff. Elec. Mag. Teleg. Co., 1 Daly (N. Y.), 547; 30 How. Pr. (N. Y.) 403; Allen's Teleg. Cas. 273.

the two places, when sold at the place of destination and the costs of transportation for such excess.[51]

§ 1418. Message ordering goods—Error in transmission—Quantity decreased—Market value.—Where a certain quantity of goods are ordered by telegraph, and, owing to an error in transmission, the quantity ordered is decreased and only a part of the amount ordered by the sender is forwarded, and subsequently the market value of such goods increases, the company will be liable to the sender for the loss sustained, the measure of damages being the increase in the market value for the difference in the quantity between that given in the message as delivered to the company for transmission and that erroneously stated in the message delivered to the addressee at the time when the sender could, after having knowledge of the error, with reasonable promptness, have obtained the balance of such goods.[52]

§ 1419. Message ordering goods—Error in transmission as to place goods to be sent—Market value.—If goods ordered by telegraph are sent to a wrong place, owing to an error in the transmission of the message, the measure of damages will be the difference between the value of the goods at the place to which they should have been sent if the message were correctly transmitted, and at the place to which they were actually sent.[53] But where horses were ordered by a message to be sent to a certain place, and the company was not informed that if the message were not transmitted the horses would be shipped to another place, it was held that the company was not liable for damages caused by the horses being sent to such other place owing to the failure of the company to transmit such message.[54]

§ 1420. Message ordering goods—Delivery to wrong person—Market value.—If, owing to the negligence of a telegraph

[51] Leonard v. New York, Albany & B. Elec. Mag. Teleg. Co., 41 N. Y. 544; Allen's Teleg. Cas. 500.

[52] Bartlett v. Western Un. Teleg. Co., 62 Me. 209; 16 Am. Rep. 437; 1 Am. Elec. Cas. 45.

[53] Western Un. Teleg. Co. v. Reid, 83 Ga. 401; 2 Am. Elec. Cas. 495. See also Western Un. Teleg. Co. v. Stevens (Tex.), 16 S. W. 1095.

[54] Evans v. Western Un. Teleg. Co., 102 Iowa, 219; 71 N. W. 219; 3 Am. Neg. Rep. 160.

company a message ordering goods is delivered to the wrong person, who in reliance thereon, sends the goods ordered, but the goods are refused, and, being perishable, are spoiled, the measure of damages will be the value of the goods together with the cost of shipment. Thus it was so held when the agent of the company at the terminal office was unable to find a person of the same name as that to which the message was addressed, changed the name and delivered the message to a wrong person in the same line of business, who filled and forwarded the order.[55]

§ 1421. Message to ship goods at once—Failure to deliver—Market value.—Where a message is delivered to a telegraph company for transmission and delivery to a person who is the owner of certain goods, to ship such goods "at once," and owing to the delay in delivery of the message the goods are not shipped until there has been a decline in the market value thereof, the company will be liable for the difference between the market value of the goods on the day when they would have been delivered, had the message been promptly delivered, and on the day the addressee is able to deliver them after actual receipt of the message. Thus it was so held where plaintiff was directed by his correspondent to "Ship your hogs at once," and the message containing the directions was delayed by defendant's negligence four days, during which there was a decline in the market value of hogs.[56]

§ 1422. Message not to ship goods—Not to purchase—Failure to deliver—Market value.—Where a message is given to a telegraph company for transmission and delivery directing the addressee not to ship goods as the market is bad, and owing to the failure of the company to deliver such message, the goods are shipped to a glutted market, the company will be liable for the difference between the price which the goods bring in the open market at the place of destination or at a place to which the vendee in the exercise of reasonable good judgment shipped them and the value at the place of shipment. So

[55] Elsey v. Postal Teleg. Co., 15 Daly (N. Y.), 58; 2 Am. Elec. Cas. 674.

[56] Manville v. Western Un. Teleg. Co., 37 Iowa, 214; 18 Am. Rep. 8; 1 Am. Elec. Cas. 92.

where a telegraph company failed to deliver a message of the above nature to the owner of cattle, in consequence of which he shipped them to a glutted market, the company was held liable as above stated, together with the cost of transportation, maintenance and sale.[57] And where a telegraph company fails to deliver a message directing the addressee not to purchase cattle on a specified day as directed by a previous message, but to wait until the following day, the company will be liable for the difference in the price of cattle on the two days.[58]

§ 1423. Message to agent not to buy—Delay in delivery.—Where an agent with authority to buy, and not to sell, owing to delay in delivery of a message from his principal instructing him not to buy cattle on a certain day, made certain purchases before the delivery of the message, it is his duty to at once notify his principal of such purchases and the measure of damages which the latter may recover cannot exceed the amount which he would have lost at the market price, when his agent could have notified him of the purchase and received back instructions from him.[59]

§ 1424. Duty of person suffering loss—Reasonable measures to diminish damages.—The duty rests upon all persons for whose losses others may be liable to respond to take all reasonable measures to diminish the damages that may occur. This principle applies to all who may claim indemnity from others for losses either upon express contracts or for tort.[60] So in cases where a person has been injured by the failure to deliver a telegraph message, or by an error in transmission thereof, and he stands in a position to suffer further loss in addition to that already incurred, he should exercise reasonable efforts to make the loss as light as possible.[61] But if an injured

[57] Western Un. Teleg. Co. v. Woods, 56 Kan. 737; 44 Pac. 989.

[58] North Packing & P. Co. v. Western Un. Teleg. Co., 70 Ill. App. 275.

[59] Western Un. Tel. Co. v. North Packing & Prov. Co., 188 Ill. 366; 58 N. E. 958; 52 L. R. A. 274, aff'g 89 Ill. App. 301.

[60] Baldwin v. United States Teleg. Co., 45 N. Y. 744; Allen's Teleg. Cas. 613, 653, per Allen, J.

[61] Western Un. Teleg. Co. v. May, 83 Ala. 542; 2 Am. Elec. Cas. 462, 463; Western Un. Teleg. Co. v. Aubrey, 61 Ark. 613; 33 S. W. 1063; Western Un. Teleg. Co. v. Reid, 83 Ga. 401; 2 Am. Elec. Cas. 494; Bartlett v. Western Un. Teleg. Co.,

party has exercised reasonable care to avert injury, the mere fact that his efforts might have been more judicious will not enable the company to escape liability.[62]

§ 1425. Real estate transactions—Message to agent from principal—Market value—Measure of damages.—If a telegraph company in the transmission of a message from a principal to an agent, makes an error and understates the price of a piece of real estate, and the agent, having full power to enter into a contract for the sale of such real estate makes a contract for its sale in accordance with the price stated in the delivered message, the company will be liable for the difference between the price erroneously stated in the message and the actual market value thereof.[63]

§ 1426. Reports of market quotations—Errors in—Measure of damages.—One of the ordinary uses of the telegraph is for the purpose of furnishing daily market reports, either by agreement with the telegraph company or by contract with an independent company or with individuals. Where such reports are transmitted by a telegraph company to a customer or addressee, and the market quotation of a certain article is erroneously stated therein, the company will be liable for damages which are sustained by such customer or addressee who has entered into a contract for the purchase or sale of such article on the basis of the erroneous quotation.[64] So where a telegraph company agreed

62 Me. 209; 1 Am. Elec. Cas. 45; Baldwin v. United States Teleg. Co., 45 N. Y. 744; Allen's Teleg. Cas. 613, 653; Leonard v. New York, A. & B. E. M. Teleg. Cas. 41 N. Y. 544; Allen's Teleg. Cas. 500; Marr v. Western Un. Teleg. Co., 85 Tenn. 529; 2 Am. Elec. Cas. 735; Pepper v. Western Un. Teleg. Co., 87 Tenn. 544; 2 Am. Elec. Cas. 756; Western Un. Teleg. Co. v. Harper, 15 Tex. Civ. App. 37; 39 S. W. 599; Washington & New Orleans Teleg. Co. v. Hobson, 15 Gratt. (Va.) 122; Allen's Teleg. Cas. 120; Western Un. Teleg. Co. v. Wofford (Tex. Civ. App. 1899), 42 S. W. 119.

[63] Western Un. Teleg. Co. v. Cook, 54 Neb. 109; 74 N. W. 395.

[64] Reed v. Western Un. Teleg. Co., 135 Mo. 661; 37 S. W. 904; 34 L. R. A. 492; 6 Am. Elec. Cas. 791.

[64] Hollis v. Western Un. Teleg. Co., 91 Ga. 801; 4 Am. Elec. Cas. 706; Turner v. Hawkeye Teleg. Co., 41 Iowa, 458; 20 Am. Rep. 605; Bank of New Orleans v. Western Un. Teleg. Co., 27 La. Ann. 49; 1 Am. Elec. Cas. 147; Hughes v. Western Un. Teleg. Co., 114 N. C. 70; 19 S. E. 100; 4 Am. Elec. Cas. 780.

to furnish a grain dealer at S. with daily reports of the grain market, C., a point beyond its line, and by reason of an error in the report such dealer was induced to purchase a quantity of grain to fill a contract for future delivery, it was held that the measure of damages was the difference between the actual purchase price and the price as represented in the report.[65] And if in the transmission of the market quotations the market price of an article is erroneously given at a figure in excess of its actual market value, and a person enters into a contract for the purchase of such article upon the basis of the erroneous price, it would seem that the measure of damages in such a case would be the difference between the actual market price and the price paid.[66] But though the price may be overstated, and a person in reliance thereon sell shares of stocks, yet if he receives therefor the market value, it is held that his recovery will be limited to the cost of the message, though a few days later he may be compelled to pay an advanced price to procure shares of the same stock.[67]

§ 1427. Commissions of agents or brokers.—Where a telegraph company erroneously transmits or delays or fails to deliver a message to an agent or broker or from such a person to a proposed buyer, as a result of which such agent or broker loses certain commissions which he would have earned if the message had been correctly transmitted, the company will be liable for the commissions so lost.[68] Thus, where the commis-

[65] Turner v. Hawkeye Teleg. Co., 41 Iowa, 458; 20 Am. Rep. 605; 1 Am. Elec. Cas. 208. In this case it appeared that the market price of wheat on the day of the quotation was $1.56 per bushel, but the message erroneously stated it at $1.21½, and the dealer directed his commission merchants in Chicago to purchase 5,000 bushels to fill a contract for future delivery, relying upon the correctness of the quotation. The wheat was purchased by them on the following Monday at $1.50 per bushel. On the following day wheat dropped to $1.12, and the day following that it was $1.12½. The difference between the price paid and the price reported by the market report was twenty-eight and one half cents per bushel, or $14.25, on the 5,000 bushels which amount was allowed as damages.

[66] See secs. 1407–1425 in this chapter.

[67] Hughes v. Western Un. Teleg. Co., 114 N. C. 70; 19 S. E. 100; 4 Am. Elec. Cas. 780. See Hollis v. Western Un. Teleg. Co., 91 Ga. 801; 4 Am. Elec. Cas. 706.

[68] Western Un. Teleg. Co. v. Fatman, 73 Ga. 285; 1 Am. Elec. Cas.

sion of a sale of land was prevented by an error in transmission by which the price was changed from one thousand dollars to ten thousand dollars, it was held that the company was liable for the commission of the broker.[69]

§ 1428. Message offering employment — Negligence of company—Measure of damages.—Where a telegraph company, either by error in the transmission or by delay, or failure to deliver a message containing either an offer of employment or an acceptance of such an offer, causes a loss of employment, the company will be liable for the loss so caused, provided the damages are certain and such as might be expected to follow the breach of the contract to transmit and deliver.[70] So a message, "Have work, come at once," is sufficient to charge the company with notice of the character of the damages which would probably result to the sendee from negligence in failing to deliver it in due time.[71] And where a person received a letter offering him work for a certain period with instructions to wire at once if accepted and plaintiff accepted the offer and wired, "I can come," but the message read "can't" instead of "can," and he lost the offered employment, it was decided that there being a complete contract of hiring by the letter and acceptance, there might be a recovery as damages of the difference between what the plaintiff would have earned under the contract and what he actually earned at other employments.[72] Where, however, employment has been lost by the fault of the telegraph company in the transmission or delivery of such message, the person so injured must use reasonable effort to obtain other employment. So, where, by the failure of telegraph company to deliver a message, a person lost an offered position as engineer at a salary of

666; United States Teleg. Co. v. Gildersleeve, 29 Md. 232; 96 Am. Dec. 519; Allen's Teleg. Cas. 390; Western Un. Teleg. Co. v. Cook, 54 Neb. 109; 74 N. W. 395.

[69] Western Un. Teleg. Co. v. Cook, 54 Neb. 109; 74 N. W. 395.

[70] Western Un. Teleg. Co. v. Hines, 96 Ga. 688; 23 S. E. 845; Western Un. Teleg. Co. v. Valentine, 18 Ill. App. 570; 1 Am. Elec. Cas. 829; Western Un. Teleg. Co. v. McKibben, 114 Ind. 511; 14 N. E. 894; 2 Am. Elec. Cas. 525; Walser v. Western Un. Teleg. Co., 114 N. C. 440.

[71] Western Un. Teleg. Co. v. Hines, 96 Ga. 688; 23 S. E. 845.

[72] McGregor v. Western Un. Teleg. Co., 85 Mo. App. 308.

"two dollars per day," it was held that it was correct to charge the jury that plaintiff's damages would be two dollars per day from the date of sending the message to the date of the commencement of the suit, excluding Sundays and deducting therefrom any amount that he had earned between such dates, and that "it was the duty of the defendant to make reasonable effort to secure other employment after failing to secure the position mentioned in the telegram, and you should deduct from any amount found due the plaintiff according to the above standard, such amount as you find that by reasonable diligence he might have earned."[73] In accordance with the directions of the plaintiff in this case the message was directed to a third party who was to inform plaintiff of the offered employment. It does not appear that the employment was for a fixed period, or time, although it was alleged that the plaintiff was a competent engineer, that there had been no vacancy in the establishment since the time of such offer, and that by reason of defendant's negligence the plaintiff had lost the opportunity of permanent employment. In another case, however, where the position lost was an appointment to an office, the tenure of which was only at the pleasure of the appointing officer, it was held that damages for loss of salary were speculative and could not be made a basis for recovery.[74]

§ 1429. Loss of reward for capture of criminal.—A telegraph company may be liable for the loss of a reward caused by its negligence in the transmission or delivery of a message relating thereto. So a telegraph company, whose agent knew that plaintiff was expecting a message relating to the capture of a criminal and that prompt delivery was required, although neither the company nor the plaintiff had any actual notice of a reward being offered but the latter understood that it would be and was acting to secure it, it was held that damages for the loss of such reward were not too remote and that plaintiff might recover.[75]

[73] Western Un. Teleg. Co. v. McKibben, 114 Ind. 511; 14 N. E. 894; 2 Am. Elec. Cas. 525.

[74] Kenyon v. Western Un. Teleg. Co., 100 Cal. 454.

[75] McPeek v. Western Un. Teleg. Co., 107 Iowa, 356; 43 L. R. A. 214; 5 Am. Neg. Rep. 314; 78 N. W. 63.

§ 1430. Failure to deliver message—Notes protested.—If a telegraph company delays delivery or fails to deliver a message either remitting money for the payment of a note or directing that such note be protested, and as a result of such failure or delay the note is protested, the sender may recover both for actual loss sustained as well as for damages to credit. So where a telegraph company received from a banking house, acting as agent for plaintiff, a message to another banking house directing the latter to protest the plaintiff's note, and the message was never delivered, it was held that the company was liable to the plaintiff and that the damages should not be measured by the limitation provided in case of repeated messages in the blank form on which the message was written, but would embrace all actual damages, including injury to credit but not exemplary damages in the absence of proof of express or implied authority or adoption by the company.[76] But in another case where it appeared that the company had failed to forward the money in time to avoid the note being protested, it was held that the company was not liable where it also appeared that the note had been taken up on the following day, that there was no evidence of any injury to plaintiff's credit, and that the fact of the protest was known only to those in the bank and to the plaintiff.[77]

§ 1431. Messages in reference to claims—Directing attachment—Negligence of telegraph company.—A telegraph company which by its negligence in the transmission or delivery of a message directing the attachment of property or the taking of other immediate means for the purpose of securing a debt or claim, causes a loss of either a whole or a part of such debt, will be liable to the person so injured for the difference between the amount which might have been secured in liquidation of such debt if the money had been promptly transmitted and delivered with the message and the amount actually secured.[78]

[76] Western Un. Teleg. Co. v. Brown, 58 Tex. 170; 44 Am. Rep. 610.

[77] Smith v. Western Un. Teleg Co., 150 Penn. St. 561.

[78] Parks v. Alta Cal. Teleg. Co., 13 Cal. 442; Allen's Teleg. Cas. 114; Bierhaus v. Western Un. Teleg. Co., 8 Ind. App. 246; 4 Am. Elec. Cas. 708; Western Un. Teleg. Co. v. Beals, 56 Neb. 415; 76 N. W. 903; Bryant v. American Teleg. Co., 1 Daly (N. Y.), 575; Allen's Teleg.

So where a message was sent by the plaintiffs in New York to their attorney in Providence, directing him to attach a house and lot of one B. in that city for the debt of $12,000, and the operator was informed of the importance of the message and that unless it was sent at once it would be of no use, and the message was not received, owing to the delay, until it was too late to make the attachment, which could have been made if the message had been promptly transmitted and delivered, and it appeared that the house and lot were worth over $12,000, it was held that the measure of damages in an action against the telegraph company was the amount of debt and interest, less $500, which had been received from the bankrupt estate of B.'s firm.[79] So in another case, where a message delivered to the telegraph company for transmission and delivery, read "Attach property A. for seven hundred ninety dollars," and it was interpreted by the addressee as being one hundred and ninety dollars, it was held that the company was liable for the balance.[80]

§ 1432. Message to physician—Lawyer—Loss of fee.—Recovery may be had from a telegraph company for failure to deliver a message to a physician or lawyer as a result of which such a person loses a fee which he would have earned, but for the failure of the company to deliver the message. So where a message to a physician, directing him to come on the day the message was sent, was not delivered until the following day, and before he could leave, the call was countermanded, it was held that the company was liable and that the measure of damages would be the difference between the lost fee and what he earned during the time the visit would have required.[81] But if the message indicates no such probable injury, it is held that there can be no recovery.[82]

§ 1433. Forged message—Payment of money in pursuance of.—Where, through the negligence of a telegraph company a

Cas. 288; Western Un. Teleg. Co. v. Sheffield, 71 Tex. 570; 2 Am. Elec. Cas. 802; Fleischner v. Pacific Postal Teleg. Cable Co., 55 Fed. 742.

[79] Bryant v. American Teleg. Co., 1 Daly (N. Y.). 575; Allen's Teleg. Cas. 288.

[80] Western Un. Teleg. Co. v. Beals, 56 Neb. 415; 76 N. W. 903.

[81] Western Un. Teleg. Co. v. Longuill (N. Mex. 1889), 21 Pac. 339; 2 Am. Elec. Cas. 638.

[82] Western Un. Teleg. Co. v. Clifton, 68 Miss. 307.

forged message is transmitted to a third party, as a result of which such third party, in reliance thereon pays money to another, the company will be liable for the actual loss sustained. So where by the negligence of the telegraph operator in one town a message, purporting to be signed by the cashier of a bank in such town was sent to bankers in another town, vouching for the credit of the person named in the message to the extent of twenty thousand dollars, and in reliance upon the despatch such bankers paid a check for ten thousand dollars, it was held that the telegraph company was liable for that amount.[83] And where a bank paid money in pursuance of a forged message sent by an operator of the telegraph company purporting to come from another bank, it was decided that the telegraph company was liable for the money so paid, but that a code provision that for wrongful conversion there might be a recovery of a "fair compensation for the time and money expended in pursuit of the property," was not applicable, and there could be no recovery of attorney's fees paid by the plaintiff to recover a portion of the money from the person to whom it was paid.[84]

§ 1434. Libelous message by agent of telegraph company. —A telegraph company is liable for the acts of its agents acting within the scope of their authority. So where the station agent of a telegraph company, acting within the scope of his employment, maliciously transmits a libelous message over the wires of said company to another of its station agents, addressed for delivery to a third person, and which is so delivered, the company is liable in punitive damages.[85] In this case the court said: "Is the company itself liable for exemplary damages by reason of the act of the agent Mr. Hale, although it did not know, direct or authorize it? . . . He also saw the libelous message and sending it was a matter incident to his business and pertaining to the particular duty of his employment. He was acting in

[83] Elwood v. Western Un. Teleg. Co., 45 N. Y. 549; Allen's Teleg. Cas. 594.

[84] Pacific Postal Tel. Cable Co. v. Bank of Palo Alto, 109 Fed. 369 (Civ. Code Cal. sec. 3336).

[85] Peterson v. Western Un. Teleg. Co., 72 Minn. 41; 40 L. R. A. 661; 74 N. W. 1022; 5 Am. Neg. Rep. 376; 8 Am. & Eng. Corp. Cas. (N. S.) 517. See Joyce on Electric Law (ed. 1900), secs. 1019, 1020.

the capacity for which he was employed and having this power he was acting within the scope of his authority. . . . That he abused the authority is no defense in such case. The master had the choice of his agent and for the abuse of that agent the master should answer to the citizen who became the victim of that abuse without his fault. One who employs another to do an act for his benefit and who has the choice of the agent ought to take the risk of injury to third persons by the manner in which he does the business. A telegraph corporation derives its legitimate corporate powers from the law and that law should not be violated without a corresponding liability for torts committed under it. Station agents may be irresponsible pecuniarily, and if for their malicious acts done within the scope of their employment the corporation is not liable, the public would be at the mercy of an unscrupulous telegraph operator; and hence the public are greatly interested in such a question and the liability for such wrongs should rest upon that body which by its act creates the power and the opportunity for committing them. It would be a lamentable condition of the right of the citizen if, under the guise of exercising lawful corporate powers, the corporation should permit the citizen to be defamed by the false and malicious public action of its agent while acting as its duly appointed representative."[86]

§ 1435. Contract between telegraph company and individual—Maintenance of office—Damages for breach of.—Where a telegraph company enters into a contract with an individual in reference to the maintenance of an office by him in a certain place for a certain number of years, no other office to be opened or maintained by the company during the term specified, and the individual to be allowed a certain part of the receipts for maintaining the office, if subsequently there is a breach of the contract by the telegraph company, it will be liable to such individual for damages which are to be computed on the basis of the average yearly receipts from the office.[87]

§ 1436. Error in message—Settlement by agent with third party for less than face value of claim.—If, by reason of er-

[86] Per Buck, J

[87] Tufts v. Atlantic Teleg. Co., 151 Mass. 269, 2 Am. Elec. Cas. 878.

rors in the transmission of messages between a principal and his agent in reference to the settlement of a claim with a third party, the agent has, under apparent authority, settled such claim for less than its face value, the principal may recover from the telegraph company for the loss resulting therefrom.[88]

§ 1437. Breach of contract for use of telephone.—Where a telephone company enters into a contract to furnish an individual the use of a telephone and telephone service generally for a certain fixed period but before the expiration of the time specified removes the telephone and refuses to continue the service, such company will be liable in damages for such breach and the recovery may include prospective profits. And where a growing business is evidenced by the actual receipts, a verdict based upon the rate of reasonable increase shown will not be set aside as excessive.[89]

§ 1438. Telegrams—Sickness, death, accidents—Generally.—One of the underlying principles in cases of telegrams relating to sickness, death, and the like, is the specially important nature of such messages, apparent upon the face thereof. These despatches, therefore, stand apart, in this respect, from the large majority of telegrams, so that in determining the cases before them involving these messages, courts have considered this fact of their manifest importance, in applying the measure of diligence required of telegraph companies and have more vigorously applied the rules governing their duty, than in cases of ordinary messages of whose importance the company has received no notice. Courts have also made other exceptions in this class of cases, as appears from those decisions which allow the right to recover damages for mental distress or anguish alone. Other instances will be apparent in the cases throughout this chapter.

§ 1439. Notice of importance or that damages may result—Contemplated damages.—It is declared that the diligence which a telegraph company is required to use in the delivery of a message will be determined to some extent from the charac-

[88] Hasbrouck v. Western Un. Teleg. Co., 107 Iowa, 160; 77 N. W. 1034.

[89] Owensboro Harrison Tel. Co. v. Wisdom (Ky.), 62 S. W. 529.

ter and importance of the message; and messages of the nature of those relating to sickness and the like should be promptly delivered and should be regarded as of more importance to the parties concerned than mere business messages. And it is also said that such messages, "in promptness of delivery should have preference over messages of the latter class.[90]" The force of this latter expression as to "preference over messages" should, however, be neither misapplied, misunderstood, nor illegally extended. Again, it is said, "When such communications relate to sickness and death, there accompanies them a common sense suggestion that they are of importance."[91] Again, if a telegraphic message announces sickness, this, in itself, is notice of the importance of prompt transmission and delivery.[92] So where a despatch read "Your child is very low, come at once," it was held that this was a sufficient notice to the company that the child might die at any moment, and called for prompt delivery, and in default thereof, resulting in a failure of the addressee to arrive in time for the funeral, the company was liable.[93] So a telegram in these words: "Send doctor on first train, Katy has broken her finger," manifests its importance and the necessity of prompt and active conduct in transmitting and delivering such message, and also that the degree of diligence required must equal the emergency. This was held to apply, without regard to rules and hours established by the company, although the reasonableness of a rule fixing office hours was declared to be properly left to the jury. The above telegram was not de-

[90] Reese v. Western Un. Teleg. Co., 123 Ind. 294; 7 L. R. A. 583; 24 N. E. 163; 3 Am. Elec. Cas. 640, 646, per Berkshire, J. In this case the message read: "My wife very ill, not expected to live."

[91] Western Un. Teleg. Co. v. Adams, 75 Tex. 531; 12 S. W. 857; 3 Am. Elec. Cas. 768, 771, per Henry, Assoc. J., quoted with approval in Lyne v. Western Un. Teleg. Co., 123 N. C. 129; 31 S. E. 350; 5 Am. Neg. Rep. 85, 88, per Furchess, J. The telegram in the Adams case was: "To F. E. Adams, Athens: Clara come quick, Rufe is dying. (Signed) O. M. Simons." See also Western Un. Teleg. Co. v. Smith (Tex. Ct. Civ. App. 1895), 33 S. W. 742; Western Un. Teleg. Co. v. Nations, 82 Tex. 539; 3 Am. Elec. Cas. 799; Western Un. Teleg. Co. v. Sweetman (Tex. Civ. App. 1898), 47 S. W. 676; Potts v. Western Un. Teleg. Co., 82 Tex. 545; Western Un. Teleg. Co. v. Carter, 45 Tex. 580.

[92] Wadsworth v. Western Un. Teleg. Co., 86 Tenn. 695; 2 Am. Elec. Cas. 742. Case was disapproved in 44 Fed. 555.

[93] Western Un. Teleg. Co. v. Waller (Tex. Civ. App. 1898), 47 S. W. 396.

livered, by reason of the office being closed until the next morning, and it had been received in time to have been delivered the proceeding night.[94] Again, a telegram sufficiently indicates its importance which reads, "Miss Carrie sick, she wants you, come to-morrow."[95] So also, where the message announces the birth of a child to the addressee's daughter and adds the words, "Come at once," even though it is stated that all are doing well."[96]

§ 1440. Same subject continued.—Notice of importance is given where the despatch states that a person named therein "is dead. Answer."[97] Again, where a father telegraphs for medical attendance for a sick child and the latter dies without such medical attendance, because of a failure to deliver the message, the company is liable in damages, the company's agent being fully aware of the situation, and no excuse for the neglect being made.[98] If, however, the company cannot be reasonably presumed to have contemplated that mental anguish would result from delaying a message, it is held that the sender cannot recover damages therefor.[99] But a message reading, "My wife is very ill, not expected to live," shows, so it is decided, upon its face, that mental distress would be a probable result of nontransmission.[100] And it would seem that in those states where a recovery is allowed for mental anguish or distress, or where evidence of such anguish or distress is admissible, telegrams as

[94] Brown v. Western Un. Teleg. Co., 6 Utah, 219; 2 Am. Elec. Cas. 834.

[95] Western Un. Teleg. Co. v. McLeod (Tex. Civ. App. 1893), 22 S. W. 988.

[96] Western Un. Teleg. Co. v. Larender (Tex. Civ. App.), 40 S. W. 1035.

[97] Western Un. Teleg. Co. v. Carter, 85 Tex. 580.

[98] Western Un. Teleg. Co. v. Russell, 12 Tex. Civ. App. 82; 33 S. W. 708.

[99] Ikard v. Western Un. Teleg. Co. (Tex. Civ. App. 1893), 22 S. W. 534; Western Un. Teleg. Co. v. Bryant, 17 Ind. App. 70; 46 N. E. 358; 1 Am. Neg. Rep. 425, 427; Western Un. Teleg. Co. v. McMillan (Tex. Ct. Civ. App. 1895), 30 S. W. 298; Western Un. Teleg. Co. v. Kirkpatrick, 76 Tex. 217; Western Un. Teleg. Co. v. Henley (Ind. App. 1899), 54 N. E. 775; Western Un. Teleg. Co. v. Bryant, 17 Ind. App. 70; 46 N. E. 358; 6 Am. Elec. Cas. 756. Telegram read, "Cannot come to-day, will come to-morrow."

[100] Reese v. Western Un. Teleg. Co., 123 Ind. 294; 7 L. R. A. 583; 24 N. E. 163; 3 Am. Elec. Cas. 640. See also Western Un. Teleg. Co. v. Moore, 67 Tex. 66; Western Un. Teleg. Co. v. Adams, 75 Tex. 531; 12 S. W. 857; 3 Am. Elec. Cas. 768.

to sickness, death and the like, ought to be held to give notice upon their face that mental suffering would necessarily result from negligent nondelivery.[1] So damages for the death of a valuable horse, by reason of negligent delay in delivery of a telegram, may be considered as within the contemplation of the contract where the message read: "Bravo is sick, come and fetch Miller at once," and it must have been known from the nature of the message, that promptness was necessary.[2]

§ 1441. Notice of relationship—Generally.—The decisions are not uniform upon the point whether a message of the character under discussion sufficiently indicate such relationship or not, or whether the question of relationship is important enough to excuse the company's failure to deliver such despatch. The weight of authority seems to indicate, however, that such telegrams sufficiently manifest whatever relationship exists to prevent the company from alleging want of notice of relationship as an excuse for negligence or delay in transmission or delivery of messages which are upon their face those of sickness, death and the like.[2a]

§ 1442. Negligence of telegraph company—Expenses as damages.—Expenses incurred in buying flowers for his mother's funeral, and in sending his brother to attend it, are a proper element of damages and a direct result of the company's negligence in transmitting a telegram which falsely stated that the mother was dead.[3] A telegraph company is not liable for the expenses of the addressee in going to his brother's residence, where owing to delay in the telegram announcing the brother's severe illness, said addressee did not reach such residence until after his brother's death, although such delay in delivery of the message renders the company liable for the injury caused thereby.[4]

[1] See Western Un. Teleg. Co. v. Adams, 75 Tex. 531; 3 Am. Elec. Cas. 768; Western Un. Teleg. Co. v. Feegles, 75 Tex. 537; Western Un. Teleg. Co. v. Randles (Tex. Ct. Civ. App. 1896), 34 S. W. 447; Western Un. Teleg. Co. v. Moore, 76 Tex. 66, and cases in next sections herein.

[2] Hendershott v. Western Un. Teleg. Co., 106 Iowa, 529, 76 N. W. 828.

[2a] See Joyce on Electric Law (ed. 1900), secs. 803–807.

[3] Western Un. Teleg. Co. v. Hines (Tex. Civ. App. 1899), 54 S. W. 627.

[4] Western Un. Teleg. Co. v. Cain, 14 Ind. App. 115; 42 N. E. 655.

§ 1443. Message to physician—Damages.—If a consulting physician is summoned by telegraph and there is a delay in the messages to and from him, but he cannot attend the patient and no suffering results from such delay, other than mental suspense, special damages cannot be recovered.[5] But where a doctor whose professional services are requested by telegraph would have responded had the message been delivered, and the patient who was suffering with hernia sustained a degree of permanent injury for want of prompt medical attention, the jury may award damages, which award will not, in the absence of passion or prejudice, be disturbed.[6]

§ 1444. Notice of claim for damages—Parties.—If the contract between the telegraph company and the sender of a message requires a notice of claim for damages to be given, a husband cannot sue the company for damages sustained by himself under a notice of damages to a woman, arising from failure of a telegraph company to send a message for medical attendance for her.[7]

§ 1445. Nonrecovery for loss of wife's services.—If a telegraph company fails to deliver a telegram summoning a physician to attend a wife, and there is no proof that her life would have been saved, but for the default, it is held that the husband cannot recover in such case for the loss of his wife's services.[8] The application to every case, however, of a rule as a general one, which would require proof that a person's life would have been saved by the attendance of a physician, would practically absolve a telegraph company from liability in all cases of failure to transmit or deliver a telegram summoning medical attendance, since there can be no evidence that a life would be saved by a physician's attendance. The utmost that any reputable physician could testify to in cases of serious illness would be that, in his opinion there was every reasonable probability that life could be saved, and even this testimony would probably be subject to a qualification as to the intervention of other causes.

[5] Western Un. Teleg. Co. v. Parks (Tex. Civ. App. 1894), 25 S. W. 813.

[6] Western Un. Teleg. Co. v. McCal, 58 Pac. 797.

[7] Swain v. Western Un. Teleg. Co., 12 Tex. Civ. App. 385; 34 S. W. 783.

[8] Western Un. Teleg. Co. v. Kendorza, 77 Tex. 257.

§ 1446. Evidence—Messages as to sickness and death—Mental anguish, etc.—Where damages for mental suffering are allowable, it is sufficient evidence of such anguish, where a telegram announcing the death of the plaintiff's mother was negligently delayed, and by reason of such negligence the plaintiff was unable to attend her funeral, and it appeared that he took time from his work in trying to discover whether a message had been sent him and inquired therefor at the company's office, and he testified that he was desirous of attending the funeral and felt "hard" at the delay in delivery of the message and telegraphed to ascertain if he could be present at the funeral. It also appeared that upon receipt of said message to him he called at defendant's office and was excited and anxious and complained of the delay and why the delivery was not made at his residence, and the plaintiff's declarations and conduct also clearly indicated that he suffered mental anxiety.[9] But statements made before his death by the deceased indicating his desire to see his brother, the addressee of a telegram announcing his illness are not admissible to show mental distress of the addressee.[10] Nor can it be shown in evidence that a father was told after his son's death that the son had expressed a desire to see him and had thought he was neglected because the father had not come in response to a telegram so requesting, where it also appeared that, notwithstanding the company's negligence in not delivering the telegram, he had received notice in sufficient time to have been present before the son's death.[11]

§ 1447. Same subject continued.—It is said in a Texas case: "As the jury would be instructed that they might, in assessing damages, include her mental anguish in their estimate, it was doubtless thought that evidence of mental condition . . . might be given as juries may, from their own knowledge and experience of human nature, estimate damages proceeding from that cause, without any evidence, it is not important to produce it and when produced it ought not as a general rule to have a

[9] Mentzer v. Western Un. Teleg. Co., 93 Iowa, 752; 62 N. W. 1; 5 Am. Elec. Cas. 709.

[10] Western Un. Teleg. Co. v. Stiles (Tex. Super. Ct. 1896), 84 S. W. 438.

[11] Western Un. Teleg. Co. v. Mellon, 96 Tenn. 66; 33 S. W. 725.

controlling effect, and yet we are not able to see why the fact that mental anguish was felt, and was exhibited by speech or otherwise, may not be proved for what it may be worth. It at least furnishes no ground for setting aside a verdict that might be sustained without any evidence as to the existence or degree of mental pain."[12] But evidence is inadmissible in these cases when it is not the natural result of the company's negligence, or failure in the performance of its duty to promptly transmit and deliver messages of this nature; nor is evidence admissible which is calculated to arouse the sympathies of the jury in favor of the plaintiff against the defendant company; nor is evidence admissible which furnishes the jury with an improper basis for damages. And of this character is evidence of the financial condition of the plaintiff; of his being among strangers and without friends and money, of his mortgaging his property; that his creditors were dunning him, and of his distress on account of his financial condition, especially so where the mortgage was given before he could have had any reasonable expectation of hearing from his father to whom he had telegraphed, stating that his wife and baby were dead and asking his father to come to his help.[13] But evidence is admissible to show that the sender could have obtained leave of absence from his employer and could have arrived in time to have reached his moth-

[12] Western Un. Teleg. Co. v. Adams, 75 Tex. 535; 12 S. W. 857; 6 L. R. A. 844; 3 Am. Elec. Cas. 768, 772, per Henry, Assoc. J., quoted with approval in Western Un. Teleg. Co. v. Jobe, 6 Tex. Civ. App. 403; 4 Am. Elec. Cas. 799, 805, per Neill, Assoc. J. In the Adams case a witness was permitted to testify that the addressee, while waiting for a train after the message had been delivered to her (stating that her brother was dying), seemed to be in great distress, and said she would give everything that she possessed to see her brother to talk to him before he died. In the Jobe case the appellant's wife had said "Words of mine are inadequate to describe my feeling;" also, "While I suffered great mental pain on account of not being with my father in his last moments and with the remainder of his family at that time in their affliction, yet I suppose that any other child who was devoted to a father and desired to be with him in his last hours, would suffer as much as I did," and those statements were admitted in evidence. The court said that the words of the supreme court quoted in the above text applied to these expressions.

[13] Gulf, Col. & S. F. R. Co. v. Levy, 59 Tex. 542; 1 Am. Elec. Cas. 543. See Western Un. Teleg. Co. v. Porter (Tex. Ct. Civ. App. 1894), 26 S. W. 866.

er's house twenty-four hours before her death, had the telegram announcing her illness been delivered promptly.[14] There is no error in ruling out evidence in defense that it was the custom of a physician, telegraphed for, not to come without prepayment or guaranteed payment of his charges. "It was not for the operator to speculate on the chances that the summons would or would not be obeyed."[15]

§ 1448. Presumptions—Mental anguish—Spiritual aid.—There is no presumption of mental anguish, as in the case of a husband or wife or near blood relative, but such mental anguish must be affirmatively proved in the case of a brother-in-law and sister-in-law, the former having failed to arrive in response to a telegram announcing the death of the plaintiff's husband, which message was negligently delayed.[16] But affirmative proof of mental suffering is unnecessary in case of a son unable by reason of negligent delay of a telegram to be present at his father's funeral.[17] An averment that one became unconscious and died before a minister summoned by telegraph reached her, does not raise the presumption that such person became unconscious before the minister could have reached her, where it is also alleged that had the telegram been promptly delivered, said minister would have arrived in time to have administered spiritual aid.[18] So a charge may be properly refused which states that the change of the word "better" to "dead" in a telegram is not of itself such proof of negligence as to entitle the sendee to recover for mental distress.[19]

§ 1449. Mental suffering — Damages — Generally.—The question whether there can be a recovery of damages for mental suffering alone, has been the subject of much controversy. Certain courts have decided that there can be such a recovery, while

[14] Western Un. Teleg. Co. v. Drake, 14 Tex. Civ. App. 601; 38 S. W. 632.

[15] Western Un. Teleg. Co. v. Henderson, 89 Ala. 510; 3 Am Elec. Cas. 570, 578.

[16] Cashion v. Western Un. Teleg. Co., 123 N. C. 267; 31 S. E. 493, citing Western Un. Teleg. Co. v. Coffin, 88 Tex. 94; 30 S. W. 896.

[17] Western Un. Teleg. Co. v. Randles (Tex. Civ. App.), 34 S. W. 447.

[18] Western Un. Teleg. Co. v. Robinson, 97 Tenn. 638; 37 S. W. 545; 34 L. R. A. 431.

[19] Western Un. Teleg. Co. v. Odom (Tex.), 52 S. W. 632.

other courts unequivocally repudiate such a doctrine. Except for the possible guidance of other courts which have not yet finally passed upon this question, it would be unnecessary to state what constitutes the weight of authority, since it may be reasonably assumed that a constant line of decisions upon this point in any one state will be followed and declared to be the law of that state, otherwise there might be a continuous series of reversals of prior rulings, and a chaotic state of the law would exist; the rule stare decisis should control, so that parties may know their relative rights and remedies, and may, therefore, the better conform to the law, when once for all time it is settled what the law is. The rule stare decisis does not, however, preclude an extension of the rules of law so as to fully meet and cover new cases, nor does it preclude the application of old principles to the new state of existing things. So that the rule stare decisis may be constantly affirmed and yet new decisions frequently be given that apparently contravene the doctrines of old cases.

§ 1450. Damages for mental suffering—Preliminary remarks.—A careful and exhaustive examination of the cases discloses the reasons, which are stated as briefly as the nature of the subject warrants in the following sections, both for and against the allowance of damages for mental suffering in cases of the character noted in this chapter. The rules of damages, however, noted in the last section are urged in behalf of both sides of the issue, and have therefore been given precedence.

§ 1451. Theory or reasons upon which damages for mental suffering allowed.—Telegraph companies exercise and enjoy special franchises and privileges under the law; their employment is of a public character and they are obliged to exercise due diligence or diligence commensurate with their undertaking. Their diligence is determined to some extent by the nature and importance of the message. They are obligated to transmit and deliver telegrams correctly, promptly, and without unreasonable delay. The addressee of a despatch is entitled to the information contained therein and the sender is entitled to have it conveyed and both are entitled to whatever benefits the information may convey or confer. For its serv-

ices in transmission and delivery the telegraph company receives a stipulated price. Messages relating to sickness, death, and the like are of special importance and import notice thereof from the very terms and nature of the telegram; they import urgency on their face, and the company contracts with reference thereto; the company is bound to know that the natural consequences of its negligence in performance or its nonperformance would naturally produce mental suffering in cases of blood relationship, and the same rule applies in other cases of relationship where such company has knowledge of the existence of affection between the parties. These messages are of far greater importance than those of a pecuniary nature. This express or implied knowledge imports a notice of liability for such consequential damages as may arise from the company's negligence or nonperformance of its duty. Such damages must, therefore, be deemed to have been in the contemplation of the company and of the parties. Messages of this nature naturally suggest damage. Neglect in performance of the company's obligation is a wrongful act. The sender or sendee, or both ought to be spared whatever pain and affliction the company's promptness and accuracy in transmission and delivery would have prevented. The wrongdoer knows what his duties and obligations are. Every infraction of a legal right contemplates some damage and some remedy. If the company violates its contract it is liable to some extent, and this being true, it is liable for all damages. The law does not permit any one by his wilful fault or neglect to impose with impunity an injury to another's feelings. The law authorizes a recovery of damages appropriate to the objects of the contract which is broken. The company is answerable for a breach of contract according to the nature of the contract and the character and extent of the injury suffered by nonperformance. If other than pecuniary benefits are contracted for other than pecuniary standards will be applied in the ascertainment of the damages flowing from the breach. Damages should be allowed which are the natural result of a wrongful act. If inexcusable negligence is the proximate cause of an injury, damages may be awarded commensurate with the injury. Damages in cases of mental suffering are an incident to the pecuniary loss. Dam-

ages caused by the wilful neglect or default of another are actual damage. The fact that the message does not relate to pecuniary or commercial transactions does not excuse negligence of the company in transmission or delivery thereof. In matters of mere trade the company may become liable for all natural and proximate damages and should be held equally liable where there is mental suffering. Reason and public policy affirm the right to recover for mental pain. The law has been gradually extended to cover new cases. The rule of the common law, that mental suffering alone, disconnected, from physical suffering, is not a ground for damages was adopted before electricity was known, and that law, as thus applied, does not cover telegraph contracts for transmission and delivery of telegrams. The common law is always adjustible to the growing needs of civilization, and is adaptable to new conditions and facts, otherwise its usefulness would cease. Action in these cases may be brought upon contract or for tort. It is an action really in the nature of a tort, not for a mere breach of contract, but for a negligent failure to perform a duty. The contract merely serves to disclose the relations between the parties. As a rule, actions may be maintained for contract or tort if an injury is done by negligence in the performance of duty contracted for. In some states forms of action are abolished, and this is important in considering and applying decisions in the United States courts and in other states where forms of action are not abolished. It is admitted that under the common law damages for mental pain could not, as a rule, be recovered when unaccompanied by physical injury, as such damages were not within the contemplation of the parties; but they were allowed when connected with physical pain. In applying the rule, however, cases of personal injury are generally spoken of. It is a curious proposition that mental anxiety is a ground for damages when connected with physical pain, but not when standing alone. Injury to the feelings is often more injurious than a physical injury. In the latter case such injury is not more directly the result of wrongful act than in cases of the character here considered. The mind is no less a part of the person than the body. Physical pain is no more real than mental anguish. The actual right to compensation for mental pain in cases allowable

under the common law had no foundation in the existence of physical pain. Both physical and mental pain have a common source of right of compensation and that is the act of the violation of a right secured by contract or the general law, and whatever necessarily results to the injured person from the violative act gives a right to compensation, and the wrongdoer knows that he is inflicting mental suffering when he withholds a message of illness or death. Damages in cases of mental suffering alone are no more vague and shadowy than in cases of mental suffering connected with physical injury and no more difficult to prove, and the verdict stands as equally proven in the first case as in the latter. The same is true as to the standard of measurement of damages, and such damages in cases of mental suffering alone, in the class of telegraphic messages under consideration, are the direct and proximate result of the company's nonperformance or neglect of its duty. Inconsistencies in jury verdicts equally prevail in cases of mental suffering connected with physical injury and those of mental suffering alone. The reason of the law applies equally in both these classes of cases. Mental suffering alone is a ground for damages. In cases where passengers are wrongfully put off or ordered from railroad trains; in certain cases from the nature of an assault where the mental pain does not result from bodily harm; in certain railroad cases; in actions for breach of promise of marriage; in actions for slander and libel; for malicious arrest and prosecution; false imprisonment; for illegally suing out an attachment; criminal conversation; seduction and for kissing a female against her will. Mental suffering resulting from indignity to a person is actual damage. It is an element of actual damage in suit for injuries to persons through negligence of others. In seduction of a daughter the action is technically for loss of services, but it is well known that compensation is not in fact given for them but for wounded and outraged feelings, and this applies to cases of injury to a wife. There may be a contract for the safe carriage of a passenger, yet an action will lie in tort for breach of this contract through negligence. Damages for mental suffering may be allowed to a wife for mutilation of her deceased husband's body, although there is no physical pain. So fright, causing nervous convulsions and illness, constitute a ground for

mental damages. Again, if no more than the sum paid for transmission of the telegram can be recovered in the class of cases here considered, the usefulness and value to the public of telegraph companies will be seriously impaired, and a premium put on their negligence. No man can depend upon the correctness or promptness of messages where the law enforces no responsibility, but if these corporations understand that they have a duty to perform and must do it or respond in damages, negligence and unskillfulness of operators will cease. This is also an answer to the argument of an intolerable amount of litigation arising if such damages are allowed. Nor should this fact, if it were one, influence courts in administering law. These companies should be held to that diligent and skillful performance of their duties which the law imposes and the greater the extent of the wrong the greater the need for a remedy. Courts should never hesitate to perform a legal duty merely because there may be other litigation on the same question caused by a refusal or neglect of some person to conform to the requirements of the law.[20]

[20] In addition to the cases cited in these decisions which support the doctrine of recovery for mental damages alone and the substance of which are noted in the above text, the following comparatively recent cases are also in a line with the argument: Mental suffering is an element of damages in trespass for wrongful removal from cemetery of a child's body. Bessemer Land & T. Co. v. Jenkins, 111 Ala. 135; 18 So. 565. Negligent arrest causing mental suffering is a ground for recovery of damages. Gibney v. Lewis, 68 Conn. 392; 36 Atl. 799. Mental suffering, connected with personal injury, can be measured by no exact pecuniary standard. North Chicago St. Ry. Co. v. Fitzgibbons, 180 Ill. 466; 54 N. E. 583, aff'g 79 Ill. App. 632. Mental suffering caused by negligence a ground of damages. Illinois Cent. R. Co. v. Robinson, 58 Ill. App. 181. In action for selling liquor to a husband brought by a wife against a saloon keeper, feelings of shame, disgrace and mortification arising from a public conviction for drunkenness, resulting from the sale, are proper elements of damages. Lucker v. Liske, 111 Mich. 863; 70 N. W. 421; 3 Det. L. N. 850. Malicious prosecution entitles to mental damages as well as material. Frill v. Plumer (N. H.), 43 Atl. 613. Mental anguish damages are allowable in false imprisonment of a woman. Limbeck v. Gerry, 15 Misc. (N. Y.) 663; 39 N. Y. Supp. 95. Mental pain caused by another's negligence may be a ground of damages. Goodhart v. Pennsylvania R. Co., 177 Penn. St. 1; 35 Atl. 191; 38 W. N. Cas. 545; 5 Am. & Eng. R. Cas. (N. S.) 364. Mortification to feelings arising from a tort is legitimate damages. Sechrist v. Jahn, 11

§ 1452. Theory or reasons upon which damages for mental suffering not allowed.—It is admitted that telegraph companies agree for hire as public servants to send messages and ought to be liable for negligence or nonperformance, but this does not give the right to create a new principle of damages. Courts have no right to abrogate the common law, if old principles do not apply to new conditions, or if there ought to be a remedy, it should be a legislative and not judicial one. The fact that the telegraph company contemplated or knew that mental suffering must follow its negligence or nonperformance of its duty is no guide, since there is merely a breach of contract. It is only where the physical injury and mental suffering are inseparable or where the injury contains some element of malice that the law recognizes mental anguish as an element of damage. Mental anguish alone was never at the common law a sufficient ground of action. Damages are also confined to those cases in which a pecuniary estimate can be made. Bare negligence, unproductive of damage, gives no right of action; negligence causing damage does. Damages for mental suffering alone, distinct and separate from physical in-

Penn. Super. Ct. 59. Fright causing mental injury is a basis of damages though there is no physical pain other than that caused by fright. Mack v. South Bound R. Co., 52 S. C. 323; 29 S. E. 905; 40 L. R. A. 679; 3 Chic. L. Jour. Week. 272, citing Bell v. Great Northern R. Co., Ir. L. R., 26 C. L. 428; Mentzer v. Western Un. Teleg. Co., 93 Iowa, 752; 28 L. R. A. 72; 62 N. W. 1; Purcell v. St. Paul City R. Co., 48 Minn. 134; 16 L. R. A. 203; Sloane v. Southern Cal. R. Co., 111 Cal. 668; 44 Pac. 322; 32 L. R. A. 193; Fitzpatrick v. Great Western R. Co., 12 U. C. Q. B. 645, disapproving Mitchell v. Rochester R. Co., 151 N. Y. 107; 45 N. E. 354; 34 L. R. A. 781 (which reverses, 77 Hun [N. Y.], 607; 59 N. Y. St. R. 892; 25 N. Y. Super. 744, which affirms, 4 Misc. 575; 30 Abb. N. C. 362); Haile v. Texas & P. R. Co., 23 U. S. App. 80; 9 U. S. C. C. A. 134; 60 Fed. 557; 23 L. R. A. 774; Spade v. Lynn & B. R. Co., 168 Mass. 285; 47 N. E. 88; 38 L. R. A. 512; Ewing v. Pittsburg, C. C. & S. L. R. Co., 147 Penn. St. 40; 14 L. R. A. 666; Victorian R. Comrs. v. Coultas, L. R. 13 App. Cas. 222. Damages for libelous publication include wounded feelings. Forke v. Homann, 14 Tex. Civ. App. 536; 38 S. W. 64. Mental anguish suffered by a wife is a proper element of damages, where a ticket is sold her to a wrong station. Texas & P. R. Co. v. Armstrong (Tex.), 51 S. W. 835. Mental suffering unaccompanied by physical pain may be allowed a passenger on account of profane, vulgar and indecent language. Houston, E. & W. T. R. Co. v. Perkins (Tex.), 52 S. W. 124.

jury were not allowed or supported in any decision prior to that of the Texas case of 1881,[21] and that ruling rested only on the unsupported statement of a text writer, so that the doctrine of the common law remained unchallenged until that time and is not therefore to be lightly disregarded. The Texas case of 1881, is a clear innovation of the law as it previously existed and should not be allowed. It is not a principle of law. An unbroken line of English authority is against it; sentiment has carried away judgment. The decisions which support this new departure rest only upon the authority of each other and are not uniform. If this doctrine could have been supported on legal grounds or by the application of sound legal principles, it cannot reasonably be supposed that the long list of eminent and learned jurists in England, and this country would have permitted such doctrine to have remained undiscovered and unsupported by any decision until 1881. Courts should prefer to travel upon antiquas vias. Precedents must be followed; the rule stari decisis is the only safe rule. The causing of mental suffering itself is not an infraction of a legal right. Mental anxiety alone is not actual damage; it is speculative. It is too remote and of a metaphysical character. In contracts, damages resulting from a breach must be measured by a pecuniary standard. The object of the law is to give redress for pecuniary loss only. Damages, if actual, must show directly and naturally from the breach of contract and must be certain, both in their nature and in respect to the cause from which they proceed. Public policy is not subserved by allowing damages for mental pain alone. The jury cannot fix such damages other than by arbitrary whim or caprice. Mental anguish alone is vague and shadowy, dependent upon nervous force or want of nerve energy, and varies in different persons or it may be simulated or be a form of hysteria. The mental distress of one person is no test of the mental distress of another. Even in cases of physical injuries and connected mental pain verdict of juries are very unsatisfatory. It is impossible to fix a monetary value upon such suffering when standing apart from physical pain. Since there can be no competent proof of the money value of mental distress alone, a verdict in such cases for money damages alone must fall for

[21] So Relle v. Western Un. Teleg. Co., cited under next section herein.

want of proof to sustain it. The action against a telegraph company in this class of cases is declared in some decisions to be ex contractu; in others, it is held to be in substance ex contractu, although it may be in form ex delicto, for tort is a wrong independent of contract. In some states the legislature has afforded some redress by way of a penalty for delayed telegrams. Mental suffering as damages is only allowed independently in cases of wilful wrong affecting liberty, character, reputation, personal security or domestic relations. In physical injury cases both the physical and mental pain are taken together—they cannot be taken separately. Injury to feelings is only allowed in those torts which consist of some voluntary act or very gross neglect or depend closely upon the decree of fault evinced by the circumstances. The mental suffering allowed in any case grows out of the sense of peril. No case allows such damages for breach of contract, except it be a marriage contract, and there they are only recoverable, if at all, in cases of tort. Breach of promise to marry is an action sui generis; it partakes of the character of an action for wilful tort. Malicious prosecution, false imprisonment, wrongful attachment and malicious arrest are essentially injuries and violations of rights affecting liberty, character, personal security and the like. In libel and slander if the words are not actionable per se, special damages must be averred and proved without reference to mental distress, and a pecuniary injury being shown, mental suffering resulting from the same act becomes an element of aggravation. In libel and slander there can be no action for mental pain alone. In seduction cases the loss of services is the basis of the suit and not the injury to the feelings. In actions of seduction and other torts independent of contract, injured feelings are only considered not to admeasure compensation, but as a standard to estimate the enormity of the outrage committed and whether the damages awarded as a punishment shall be higher or lower. In case of the death of an adult child through negligence of another, no action lies for injury to the feelings. Even under statutes allowing actions in such cases injury to the feelings is not an element of damages. In statutes for recovery for homicide against the slayer, no mental grief damages are allowed.

Where a statute gives a right of action for intoxicating a husband, there can be no recovery for mental distress. There can be no recovery for mental pain and anxiety in case of failure to pay borrowed money nor for deliberate insult by calling names. Where passengers are put off railroad trains, the minute one is ordered off the train he is under duress, his right of personal liberty is violated. Where fright caused by negligence is so great as to immediately produce physical pain, no damages are allowed for mental pain unlikely to result from the wrongful act; and in case of fright, causing illness, if damages are recoverable for mental suffering, they are allowed only on the ground of the physical suffering. For desecration of a grave no action could be sustained at common law; the only protection was by indictment or trespass quare clausum fregit, brought by the owner of the lot, where injury to the feelings was allowed only because the act was wilful or wanton. Delay of a railroad train affords no ground for mental distress alone, occasioned by such delay. It is urged in one case that an invitation by delayed or nondelivered telegram affords as much ground for recovery for mental mortification and anxiety as one relating to mental illness or death. If this new doctrine of recovery of damages for mortal suffering alone is to become the law, such a rapid increase of litigation would result as would become intolerable; the consequent evils of such a rule are evidenced by the great increase in this call of cases in Texas and in other states where this doctrine has prevailed. It is admitted, however, in one case,[22] that if there is such gross negligence on the part of the telegraph company as to indicate wantonness or a malicious purpose, there might be a recovery of damages for mental suffering alone or mental distress might be considered as the natural and proximate result of physical injury. It is also admitted that an action may be brought for neglect of the company to perform its duty when such neglect is attended with damage, even if there is no contract.[23] So in West Virginia damages for mental anguish and

[22] Crawson v. Western Un. Teleg. Co., 47 Fed. 544; 3 Am. Elec. Cas. 820.

[23] In addition to the cases cited in those decisions which support the doctrine of nonrecovery for mental suffering alone, and the substance of which are noted in the above text, the following comparatively recent cases are also in line with the

grief are now by code recoverable against telegraph companies.[23a]

argument: Expulsion of a railroad passenger does not include mental anguish damages owing to delay in reaching a sick brother, which he explained to the conductor. Hot Springs R. Co. v. Deloney, 65 Ark. 177; 45 S. W. 351. There can be no recovery for damages for mental suffering without physical injury. Texarkana & Ft. S. R. Co. v. Anderson (Ark. 1899), 53 S. W. 673. Only mental pain for which damages can be recovered is that which is the direct and necessary result of physical pain. Chicago City Ry. Co. v. Anderson, 182 Ill. 298; 55 N. E. 366, aff'g 80 Ill. App. 71. Pain and suffering allowable in personal injury case. (Penn. 1899.) Schenkel v. Pittsburg & B. Tract. Co., 44 Atl. 1072; Thomas v. Gates (Cal. 1899), 58 Pac. 315; Consolidated Tract. Co. v. Lambertson, 60 N. J. L. 457; 38 Atl. 684; 10 Am. & Eng. R. Cas. (N. S.) 753, aff'g 59 N. J. L. 297; 36 Atl. 100. Loud and angry words and threats to call a constable, spoken to a woman causing great excitement and fright and producing St. Vitus's dance are not actionable negligence. Braun v. Craven, 175 Ill. 401; 51 N. E. 657; 42 L. R. A. 199, aff'g 73 Ill. App. 189; 3 Chic. L. Jour. Week. 77. Mere fright or terror not a ground for damages although it superinduces nervous shock. Braun v. Craven, 175 Ill. 401; 51 N. E. 657; 42 L. R. A. 199, aff'g 73 Ill. App. 189; 3 Chic. L. Jour. Week. 77, citing numerous cases, and disapproving Bell v. Great Northern R. Co., Ir. L. R. 26 C. L. 432; Purcell v. St. Paul City R. Co., 28 Minn. 134; 16 L. R. A. 203. Mental pain alone not an element of damages. Chicago City R. Co. v. Canevin, 72 Ill. App. 81; 2 Chic. L. Jour. Week. 600, citing Bovee v. Danville, 53 Vt. 183. Mental pain disconnected from physical injury or resulting from an accident resulting in an injury is not a basis of damages. Chicago City R. Co. v. Taylor, 170 Ill. 49; 48 N. E. 831; 9 Am. & Eng. R. Cas. (N. S.) 513, aff'g 69 Ill. App. 613. Mental suffering alone, no ground for damages except when allowed as punitive punishment in some cases. Kalen v. Terre Haute & I. R. Co., 18 Ind. App. 202; 47 N. E. 694, citing numerous cases and distinguishing Victorian R. Comrs. v. Coultas, L. R. 13 App. Cas. 222; Fitzpatrick v. Great Western R. Co., 12 U. C. Q. B. 645. Fright, terror and mental anguish, no ground alone for damages, even if they cause physical pain. Spade v. Lynn & B. R. Co., 168 Mass. 285; 47 N. E. 88; 14 Nat. Corp. Rep. 860; 38 L. R. A. 512. Mental suffering caused by suspension from an exchange by reason of a wilful violation of a rule of the exchange is no ground for damages. Albers v. Merchants' Exch., 138 Mo. 140; 39 S. W. 473; 6 Am. & Eng. Corp. Cas. (N. S.) 620. Fright alone does not constitute a basis of recovery only when accompanied by the harm occasioned by the injury. O'Flaherty v. Nassau Elec. R. Co., 34 N. Y. App. Div. 74; 54 N. Y. Supp. 96; 58 Alb. L. Jour. 347. Fright causing miscarriage, no ground for damage. Mitchell v. Rochester R. Co., 151 N. Y. 107; 45 N. E. 354; 34 L. R A. 781, rev'g 77

[23a] Supp. Code W. Va. (1900), p. 78, act approved March 2, 1900.

§ 1453. States allowing mental suffering damages—Telegrams of sickness, death, etc.—Damages for mental suffering and anguish may be recovered against a telegraph company for negligent or grossly negligent or unexcusable delay or non-delivery of a telegram relating to sickness, death and the like, where the company has express or implied notice from the telegram itself or otherwise of the relation of affection between the parties, or that they are blood relations, and that such telegram relates to sickness, death, and the like, in the following states: Alabama,[24] Indiana,[25] Iowa,[26] Kansas,[27] Kentucky,[28] North

Hun (N. Y.), 607; 59 N. Y. St. R. 892; 25 N. Y. Supp. 744, which affirms 4 Misc. 575; 30 Alb. N. C. (N. Y.) 362. Statute allowing recovery for death of husband does not allow recovery for the widow's mental pain. Knoxville, C. G. & L. R. Co. v. Wyrick, 99 Tenn. 500; 42 S. W. 434 (Tenn. Code, sec. 4029). But see Frafford v. Adams Exp. Co., 8 Lea (Tenn.), 96. Mental worry and disappointment from delay in carrying passenger no ground for damages. Turner v. Great Northern R. Co., 15 Wash. 213; 46 Pac. 243; 5 Am. & Eng. R. Cas. (N. S.) 238. Damages for mental distress due to delay in delivery of money sent by telegraph not recoverable by sender. Ricketts v. Western Un. Teleg. Co. (Tex. Civ. App.), 30 S. W. 1105; nor by addressee. De Voegler v. Western Un. Teleg. Co. (Tex. Civ. App.), 30 S. W. 1107.

[24] Western Un. Teleg. Co. v. Seed, 115 Ala. 670; 22 So. 474; 3 Am. Neg. Rep. 1; Western Un. Teleg. Co. v. Adair, 115 Ala. 441; 22 So. 73; 2 Am. Neg. Rep. 487; Western Un. Teleg. Co. v. Wilson, 93 Ala. 32; 3 Am. Elec. Cas. 586; Western Un. Teleg. Co. v. Cunningham, 99 Ala. 314; 4 Am. Elec. Cas. 656; 14 So. 579; Western Un. Teleg. Co. v. Henderson, 89 Ala. 510; 3 Am. Elec. Cas. 570.

[25] Reeve v. Western Un. Teleg. Co., 123 Ind. 294; 24 N. E. 163; 7 L. R. A. 583; 3 Am. Elec. Cas. 640; Western Un. Teleg. Co. v. Briscoe, 18 Ind. App. 22; 47 N. E. 473; 3 Am. Neg. Rep. 545; Western Un. Teleg. Co. v. Bryant, 17 Ind. App. 70; 46 N. E. 358; 6 Am. Elec. Cas. 756; Western Un. Teleg. Co. v. Cain, 14 Ind. App. 115; Western Un. Teleg. Co. v. Moore, 12 Ind. App. 136; 5 Am. Elec. Cas. 700; 46 N. E. 358; 1 Am. Neg. Rep. 427; Western Un. Teleg. Co. v. Cline, 8 Ind. App. 364; 4 Am. Elec. Cas. 731; Western Un. Teleg. Co. v. Stratemener (Ind. App. 1892), 32 N. E. 871; 4 Am. Elec. Cas. 730, but in this case no recovery for distress arising from sympathy with the sorrow of others. Western Un. Teleg. Co. v. Cline, 8 Ind. App. 364; 35 N. E. 564; Western Un. Teleg. Co. v. Newhouse, 6 Ind. App. 422; 33 N. E. 800.

[26] Mentzer v. Western Un. Teleg. Co., 93 Iowa, 752; 62 N. W. 1; 5 Am. Elec. Cas. 709; 28 L. R. A. 72. But see Ferguson v. Davis, 57 Iowa, 601; 10 N. W. 906.

[27] Western Un. Teleg. Co. v. McCall (Kan. App. 1899), 58 Pac. 797, a case of summoning medical aid by telegraph. Contra, West v. Western Un. Teleg. Co., 39 Kan. 93; 2 Am. Elec. Cas. 588.

[28] Western Un. Teleg. Co. v. Fisher (Ky. 1900), 54 S. W. 830; Western

Carolina,[29] Tennessee,[30] Texas,[31] and in a case in the Federal courts for Texas.[32]

Un. Teleg. Co. v. Van Cleave (Ky. 1900), 54 S. W. 827; Chapman v. Western Un. Teleg. Co., 90 Ky. 265; 30 Am. & Eng. Corp. Cas. 627; 12 Ky. L. Repr. 265; 13 S. W. 880; 3 Am. Elec. Cas. 670.

[29] Bennett v. Western Un. Teleg. Co., 128 N. C. 103; 38 S. E. 294; Laudie v. Western Un. Teleg. Co., 124 N. C. 528; 32 S. E. 886; Cashion v. Western Un. Teleg. Co., 124 N. C. 459; 32 S. E. 746; 45 L. R. A. 160; 123 N. C. 267; 31 S. E. 493; Lyne v. Western Un. Teleg. Co., 123 N. C. 129; 5 Am. Neg. Rep. 85; 31 S. E. 350; Havener v. Western Un. Teleg. Co., 117 N. C. 540; 23 S. E. 457; Sherrill v. Western Un. Teleg. Co., 116 N. C. 655; 21 S. E 429; 5 Am. Elec. Cas. 754; 117 N. C. 352; 23 S. E. 277; 109 N. C. 527; Thompson v. Western Un. Teleg. Co., 107 N. C. 449; 3 Am. Elec. Cas. 750; 12 S. E. 427; Young v. Western Un. Teleg. Co., 107 N. C. 370; 11 S. E. 1044; 3 Am. Elec. Cas. 734. See next section herein.

[30] Western Un. Teleg. Co. v. Robinson, 97 Tenn. 638; 34 L. R. A. 431; 37 S. W. 544, minister was summoned in this case to dying daughter. Wadsworth v. Western Un. Teleg. Co., 86 Tenn. 695; 8 S. W. 574; 2 Am. Elec. Cas. 736.

[31] Western Un. Teleg. Co. v. Norton (Tex. Civ. App.), 62 S. W. 1081; Western Un. Teleg. Co. v. Coffin, 88 Tex. 94; 30 S. W. 896; 5 Am. Elec. Cas. 781; Western Un. Teleg. Co. v. Smith, 88 Tex. 9; 30 S. W. 549; Western Un. Teleg. Co. v. Erwin (Tex. 1892), 19 S. W. 1002; Western Un. Teleg. Co. v. Carter, 85 Tex. 580; Western Un. Teleg. Co. v. Beringer, 84 Tex. 38; 19 S. W. 336; Western Un. Teleg. Co. v. Nations, 82 Tex. 539; 18 S. W. 709; 3 Am. Elec. Cas. 799; Western Un. Teleg. Co. v. Lydon, 82 Tex. 364; 18 S. W. 701; Potts v. Western Un. Teleg. Co., 82 Tex. 545; Western Un. Teleg. Co. v. Rosentreter, 80 Tex. 406; 16 S. W. 25; 35 Am. & Eng. Corp. Cas. 77; 3 Am. Elec. Cas. 782; Gulf, Colo. & S. F. Teleg. Co. v. Richardson, 79 Tex. 649; Western Un. Teleg. Co. v. Adams, 75 Tex. 531; 3 Am. Elec. Cas. 768; 12 S. W. 857; 6 L. R. A. 844; Western Un. Teleg. Co. v. Simpson, 73 Tex. 422; 11 S. W. 385; 3 Am. Elec. Cas. 819, case of breach of contract to send money; Western Un. Teleg. Co. v. Broesche, 72 Tex. 654; 2 Am. Elec. Cas. 815; 10 S. W. 734; 13 Am. St. Rep. 843; Western Un. Teleg. Co. v. Cooper, 71 Tex. 507; 2 Am. Elec. Cas. 795; Stuart v. Western Un. Teleg. Co., 66 Tex. 580; 18 S. W. 351; 2 Am. Elec. Cas. 771; So Relle v. Western Un. Teleg. Co., 55 Tex. 308; 40 Am. Rep. 805; 1 Am. Elec. Cas. 348, still the law in Texas, though reversed in Gulf, Colo. & S. F. R. Co. v. Levy, 59 Tex. 563; 1 Am. Elec. Cas. 536; 46 Am. Rep. 278; Western Un. Teleg. Co. v. Odom (Tex.), 52 S. W. 632; Ward v. Western Un. Teleg. Co. (Tex.), 51 S. W. 259; Jones v. Roach (Tex.), 51 S. W. 549, and other court of civil appeals cases which want of space prevents citing by name, but which may be found in 47 S. W. 396; 25 S. W. 661; 22 S.W. 534; 36 S. W. 314; 19 S. W. 898; 22 S. W. 417; 5 Tex. Civ. App. 55;

[32] Bearsley v. Western Un. Teleg. Co. (U. S. C. C. W. D. Tex. 1889), 39 Fed. 182. But see contra, Western Un. Teleg. Co. v. Wood, 13 U. S. App. 317; 6 U. S. C. C. App. 432; 57 Fed. 471, and next section herein.

§ 1454. States not allowing mental suffering damages—Telegrams of sickness, death, etc.—Mental suffering alone is not a ground of recovery for damages, in Alabama,[31] and cannot be recovered for negligence or delay in delivering, or failing to deliver a telegram as to sickness, death, and the like in Arkansas,[34] Dakota,[35] Florida,[36] Georgia,[37] Illinois,[38] Indiana,[39] Kansas,[40] Minnesota,[41] Mississippi,[42] Missouri,[43] New York,[44] Ohio,[45]

3 Am. Neg. Rep. 618; 2 Tex. Civ. App. 129, 624; 47 S. W. 676; 6 Tex. Civ. App. 585; 54 S. W. 627; 33 S. W. 742; 26 S. W. 245; 866; 27 S. W. 792; 29 S. W. 932. But see Western Un. Teleg. Co. v. Edmondson, 91 Tex. 206; 42 S. W. 549; 2 Am. Neg. Rep. 807, rev'g 40 S. W. 622. But in Western Un. Teleg. Co. v. Bell (Tex. Civ. App. 1901), it is held that damages cannot be recovered for mental suffering caused by anger and resentment towards a company for non-delivery of a death message.

[33] Western Un. Teleg. Co. v. Wilson, 93 Ala. 32; 3 Am. Elec. Cas. 586, though proof thereof is admissible in aggravation of damages, if other grounds of damages, either nominal or substantial, be averred or proved, and if contractual relations be established. This case in reality holds that such damages are recoverable in this class of cases, and such is the rule in this state, though arrived at by this process of reasoning. See preceding section.

[34] Pray v. Western Un. Teleg. Co., 64 Ark. 538; 43 S. W. 965; 39 L. R. A. 463.

[35] Russell v. Western Un. Teleg. Co., 3 Dak. 315; 19 N. W. 408; 1 Am. Elec. Cas. 653.

[36] International O. Teleg. Co. v. Saunders, 32 Fla. 434; 14 So. 148; 4 Am. Elec. Cas. 674.

[37] Chapman v. Western Un. Teleg. Co., 88 Ga. 763; 30 Am. St. Rep. 183; 4 Am. Elec. Cas. 686; 15 S. E. 901.

[38] Western Un. Teleg. Co. v. Halton, 71 Ill. App. 63. But see Logan v. Western Un. Teleg. Co., 84 Ill. 468; 1 Am. Elec. Cas. 235, which is frequently cited in support of the contrary doctrine, but it merely holds that if mental suffering is alleged and loss of money expended in the matter of a transmission of a message, the complaint is good on demurrer, at least to the extent of nominal damages paid for transmitting the message.

[39] Western Un. Teleg. Co. v. Ferguson, 157 Ind. 64; 60 N. E. 674.

[40] West v. Western Un. Teleg. Co., 39 Kan. 93; 2 Am. Elec. Cas. 588; 17 Pac. 807; contra, Western Un. Teleg. Co. v. McCall (Kan. App. 1899), 58 Pac. 797.

[41] Francis v. Western Un. Teleg. Co., 58 Minn. 252; 59 N. W. 1078; 49 Am. St. Rep. 507; 5 Am. Elec. Cas. 739

[42] Examine Western Un. Teleg. Co. v. Rogers, 68 Miss. 748; 9 So. 823.

[43] Connell v. Western Un. Teleg. Co., 116 Mo. 34; 38 Am. St. Rep. 575; 4 Am. Elec. Cas. 748; 22 S. W. 345; Newman v. Western Un. Teleg. Co., 54 Mo. App. 434.

[44] Curtin v. Western Un. Teleg. Co., 13 N. Y. App. Div. 253; 55 Atl. L. Jour. 264; 42 N. Y. Supp. 1109; 6 Am. Elec. Cas. 812; 1 Am. Neg. Rep. 127, rev'g 16 Misc. (N. Y.) 347; 38 N. Y. Supp. 58, which rev'd 14 Misc. 459; 36 N. Y. Supp. 1111; 72 N. Y. St. R. 260.

[45] Morton v. Western Un. Teleg.

Oklahoma,[46] Wisconsin,[47] and the Federal and circuit court of appeals, one decision, however, being qualified.[48]

§ 1455. Mental suffering damages — Continued — Text writers.—The general rule of the common law that mental suffering alone, disconnected or separate from physical injury cannot be a sole basis of damages is asserted by a number of text writers.[49] But other text writers hold that mental suffering need not necessarily be connected with physical injury to constitute a basis of damages in cases of the character considered in this chapter.[50]

§ 1456. Mental suffering damages—Telegrams of sickness, death, etc.—Conclusion. If we are to be governed solely by the decisions in those states which have passed upon this

Co., 53 Ohio St. 431; 53 Am. St. Rep. 648; 6 Am. Elec. Cas. 818; Kline v. Western Un. Teleg. Co. (C. P.), 3 Ohio N. P. 143, extending the rule to physical suffering caused by mental suffering resulting from failure to deliver a message.

[46] Butner v. Western Un. Teleg. Co., 2 Okl. 234; 37 Pac. 1087; 5 Am. Elec. Cas. 758.

[47] Summerfield v. Western Un. Teleg. Co., 87 Wis. 1; 41 Am. St. Rep. 17; 4 Am. Elec. Cas. 823; 57 N. W. 973.

[48] Galian v. Western Un. Teleg. Co. (U. S. C. C. Dist. Minn. 1894), 59 Fed. 433; 4 Am. Elec. Cas. 855; Western Un. Teleg. Co. v. Wood (U. S. C. C. A. N. D. Tex. 5th Cir. 1893), 57 Fed. 471; 4 Am. Elec. Cas. 838; Kester v. Western Un. Teleg. Co. (U. S. C. C. N. D. Ohio, 1893), 55 Fed. 603; 4 Am. Elec. Cas. 834; Tyler v. Western Un. Teleg. Co. (U. S. C. C. W. D. Va. 1893), 54 Fed. 634; 4 Am. Elec. Cas. 829; Cransen v. Western Un. Teleg. Co. (U. S. C. C. W. D. Ark. 1891), 47 Fed. 544; 3 Am. Elec. Cas. 820, but said in this case, that there must, to warrant such a recovery, be such gross negligence of the company as to show a wanton and malicious purpose. Chase v. Western Un. Teleg. Co. (U. S. C. C. N. D. Ga. 1890), 44 Fed. 554; 3 Elec. Cas. 817. See preceding section for case contra in Federal court. It will be observed that, with one exception, none of the cases in this note were decided in circuits or districts in states holding such damages recoverable and also that forms of action are not abolished in the Federal courts.

[49] Cooley on Torts, 271 (2d ed.), p. 716; Greenleaf on Ev. sec. 2673; Parsons on Contracts (8th ed.), bottom pp. 176, 177, * p. 167, where it it said: "But mere mental suffering seems in many cases to be disregarded unless the injury be wanton and malicious, but not always." Whart. on Neg. sec. 78; Woods' Mayne on Damages, p. 74, note p. 75 (1st Am. ed.), sec. 54, note 1.

[50] Shearman & Redfield on Neg. sec. 605, p. 662; 2 id. (5th ed.) sec. 756; 1 Sutherland on Damages (2d ed.), secs. 95–97 et seq.; 3 id. secs. 975–980; 2 Sedgwick on Damages (8th ed.), 894. See 4 Lawson's Rights & Rem. sec. 1970; 2 Thompson on Neg. pp. 847, 849.

question in connection with telegrams alone, irrespective of any application of analogous cases, and if a majority of states out of this number constitute what is known as weight of authority, then certainly damages cannot be recovered for mental suffering caused by the negligence of, or nonperformance of, its duty by telegraph companies in transmitting and delivering messages relating to sickness, death and the like, even though such companies have express notice from the telegram itself or otherwise of the urgency of prompt transmission and delivery. "Weight of authority" is a forceful term in itself, but when it is constantly used as in this instance, by the courts on both sides, the determination of what is the law becomes difficult. If sound argument is the factor in ascertaining what constitutes weight of authority on this question, then the application of the test must rest upon individual opinion, and the result is necessarily a conflict of authority, whether the opinions be those of courts or text writers. We have endeavored to present fully and fairly herein at the beginning of this discussion, the opposing views and then to aid us in determining the point have studied analogous cases. We are satisfied that it was the common-law rule that the mental suffering alone was not a basis of action for damages, but that in cases where it was connected with physical injury, it constituted an element of damages. If that rule remained in its integrity and without any exceptions, then, stare decisis would be a strong argument. But exceptions have gradually crept in, and the principles of the common law have been adopted and applied to new circumstances. The underlying principle, however, still remains intact, and frequently what seem to be clear innovations of the law are but affirmances of its principles. It is the antiquated way, but the landmarks have changed. This tendency of the courts to extend old principles to new facts is clearly manifest throughout the whole growth of electric law, and in cases based on analogous principles; the same is true of the great body of insurance laws since Lord Mansfield's time. Stare decisis has never forbidden the extension of old principles to new facts.[51] One leading principle of the law is that for every infraction of a legal right there ought to be some remedy. Another principle is that these

[51] See Joyce on Elec. Law, secs. 20, 42.

telegraph companies are obligated both by contract and by virtue of this relation to the public to perform their legal duties. Sending these messages of illness and death is one of these duties. They have notice that such messages are important. The principle of the old rule which allowed proof of mental suffering in physical injury cases can be gradually traced from the time of its original confinement to physical injury cases down through various decisions in these telegraph cases of illness and death. Its application has been varied to meet different circumstances gradually, slowly, it is true, but nevertheless this fact remains. We therefore, for the above reasons, and for the reasons advanced in support of such view, at the beginning of this discussion, are of the opinion that mental suffering is a proper element of damages in these telegraph cases of sickness and death, where the telegraph companies have negligently caused such injury through failure to perform their duty. This ought to be especially applicable to those cases where medical attendance is summoned by telegraph and the patient by reason of inability to procure such attendance caused by the company's negligence, suffers an increase of physical pain and, naturally, mental pain and anxiety.

§ 1457. Physical suffering following mental suffering.— Physical suffering consequent upon mental suffering is held to be too remote to constitute a basis of damages in a Federal case, also in New York.[52]

§ 1458. Mental suffering damages — Special governing facts.—Special circumstances may change the application of the rule which prevails in any state, as to damages for mental suffering. Thus a telegram "Cannot come to-day, will come to-morrow," sent by a woman to her husband, does not warrant recovery for mental distress and physical discomfort caused by her husband not meeting her, owing to the failure of the com-

[52] Tyler v. Western Un. Teleg. Co. (N. S. C. C. W. D. Va. 1893), 54 Fed. 634, 4 Am. Elec. Cas. 829, Curtin v. Western Un. Teleg. Co., 13 N. Y. App. Div. 253; 55 Alb. L. J. 264; 42 N. Y. Supp. 1109; 6 Am. Elec. Cas. 812; 1 Am. Neg. Rep. 127, rev'g 16 Misc. (N. Y.) 347; 38 N. Y. Supp. 58, which read 14 Misc. 459; 36 N. Y. Supp. 1111; 72 N. Y. St. Rep. 260. See also Western Un. Teleg. Co. v. Bryant (Ind. App. 1897), 1 Am. Neg. Rep. 425.

pany to deliver the telegram.[53] Nor can a wife sue for such recovery where she is not a party to, nor mentioned in, the message to her husband announcing her mother's sickness.[54] Cases of this character are, however, necessarily illustrative, and rest upon their own particular facts, and so are given in the subjoined note.[55]

§ 1459. Mental suffering damages—That addressee may recover.—An adressee may recover damages for mental distress consequent upon delay of a reply message, whereby he is prevented from reaching his mother before her death.[56] If the agency of the sender is disclosed to the sendee, nominal damages for the breach of contract can be at least recovered, also dam-

[53] Western Un. Teleg. Co. v. Bryant (Ind. App. 1897), 1 Am. Neg. Rep. 425.

[54] Davidson v. Western Un. Teleg. Co. (Ky. 1900), 54 S. W. 830; Southwestern Teleg. & Teleph. Co. v. Gotcher (Tex. 1899), 53 S. W. 686.

[55] Where there is no blood relationship and no legal presumption of affection and relationship not disclosed, no recovery can be had. Western Un. Teleg. Co. v. Steinberger (Ky. 1900), 54 S. W. 829; Davidson v. Western Un. Teleg. Co. (Ky. 1900), 54 S. W. 830; Southwestern Teleg. & Teleph. Co. v. Gotcher (Tex. 1899), 53 S. W. 686. Recovery cannot be had for loss of a brother's companionship at a mother's funeral. Western Un. Teleg. Co. v. Birchfield, 14 Tex. Civ. App. 664; 38 S. W. 635. Nor where the addressee could not have arrived in time for the funeral if the telegram had been promptly delivered. Western Un. Teleg. Co. v. Edmonson, 91 Tex. 206; 42 S. W. 549, rev'g 40 S. W. 622; Western Un. Teleg. Co. v. Linn, 87 Tex. 7; Western Un. Teleg. Co. v. Motley, 87 Tex. 38; Western Un. Teleg. Co. v. Smith (Tex. Supreme Ct. 1895), 30 S. W. 549. Nor for loss and companionship of a wife during her last hours where notwithstanding the delayed telegram, the husband reached her side in time to converse with her, there being in this case no claim based on the shortened period of such comfort and consolation. Western Un. Teleg. Co. v. Stacy (Tex. Civ. App.), 41 S. W. 100. Nor can a wife recover for mental anguish consequent upon nondelivery of a telegram stating the time when her husband will arrive, in answer to a summons by telegraph announcing his mother's serious sickness. Johnson v. Western Un. Teleg. Co., 14 Tex. Civ. App. 536; 38 S. W. 64. So in case of death of a child before birth, mental suffering of the husband is only reflective and damages therefor cannot be recovered. Western Un. Teleg. Co. v Cooper, 71 Tex. 507. So estrangement from his family, by reason of the sendee's apparent neglect to be present at a child's death is not ground for damages for the consequent mental pain. McBride v. Sunset Teleg. Co. (C. C. D. Wash.), 96 Fed. 81.

[56] Western Un. Teleg. Co. v. Cunningham, 99 Ala. 314; 4 Am. Elec. Cas. 656.

ages for mental suffering of the addressee occasioned by the company's default.[57] So special damages and damages for mental anguish can be recovered by the addressee under an Indiana case.[58] So also in Kentucky, for failure to deliver a message whereby the addressee was unable to reach his father before his death. But remote and conjectural damages are not recoverable, such as the probability of the donation to the addressee of a promissory note by his father, had he reached the latter before his death.[59] So a wife who is an addressee and who is unable by reason of a delay in a telegram to reach her dying husband before his death, may recover damages for mental suffering.[60] Such damages may also be recovered by an addressee under a statute rendering a telegraph company liable to the party aggrieved by a failure of the company to transmit messages correctly and without unreasonable delay.[61] Mental suffering damages may also be recovered by the addressee in Texas.[62] So also a person for whose benefit a message is sent or who is named therein or of whose interest therein the company has notice at the time of presentation for transmission.[63] The question whether the sender was the agent of the addressee may properly be submitted to the jury although it is probably immaterial in Texas, where it is clearly apparent that the contract for transmission and delivery is made for the benefit of the addressee and he

[57] Western Un. Teleg. Co. v. Wilson, 93 Ala. 32; 3 Am. Elec. Cas. 586, 587, 588.

[58] Western Un. Teleg. Co. v. Moore, 12 Ind. App. 136; 5 Am. Elec. Cas. 700.

[59] Chapman v. Western Un. Teleg. Co., 90 Ky. 265; 3 Am. Elec. Cas. 670.

[60] Lyne v. Western Un. Teleg. Co., 123 N. C. 129; 5 Am. Neg. Rep. 85; 35 S. E. 350; Sherrill v. Western Un. Teleg. Co., 117 N. C. 352; 23 S. E. 277; Havener v. Western Un. Teleg. Co., 117 N. C. 540; 23 S. E. 457.

[61] Wadsworth v. Western Un. Teleg. Co., 86 Tenn. 605; 8 S. W. 574; 2 Am. Elec. Cas. 736.

[62] Western Un. Teleg. Co. v. Rosentreter, 80 Tex. 406; 3 Am. Elec. Cas. 782; Western Un. Teleg. Co. v. Erwin (Tex. Sup. Ct. 1892), 19 S. W. 1002; Western Un. Teleg. Co. v. Smith (Tex. Civ. App.), 33 S. W. 742; Western Un. Teleg. Co. v. Waller (Tex. Civ. App. 1898), 47 S. W. 396; Western Un. Teleg. Co. v. Sweetman (Tex. Civ. App. 1898), 47 S. W. 676; Western Un. Teleg. Co. v. Hale, 11 Tex. Civ. App. 79; 32 S. W. 814; Western Un. Teleg. Co. v. Ward (Tex. Civ. App. 1892), 19 S. W. 898; Western Un. Teleg. Co. v. Zane, 6 Tex. Civ. App. 585; Texas Teleg. & Teleph. Co. v. Seiders (Tex. Ct. Civ. App. 1895), 29 S. W. 238.

[63] Western Un. Teleg. Co. v. Coffin, 88 Tex. 94; 30 S. W. 896; 5 Am. Elec. Cas. 781.

would therefore have a right of action though he was not a party to the contract.[64]

§ 1460. Mental suffering damages—That addressee may not recover.—An addressee cannot under a Georgia case recover damages for mental pain and suffering caused by failure to deliver a message whereby said addressee was unable to see his brother before the latter's death;[65] nor can a recovery be had for such damages alone, either under the common law or by statute in Minnesota,[66] nor can such recovery be had in Mississippi,[67] nor in Ohio,[68] nor in New York on the ground, however, of want of contractual relations,[69] and in Texas, in cases where special notice of relationship is required to be given the telegraph company and the requirement is not complied with, the addressee cannot recover.[70] So in a Federal case it is held that the addressee cannot recover for mental damages alone.[71]

[64] Western Un. Teleg. Co. v. Jones, 81 Tex. 271; 3 Am. Elec. Cas. 794.

[65] Chapman v. Western Un. Teleg. Co., 88 Ga. 763; 4 Am. Elec. Cas. 686.

[66] Francis v. Western Un. Teleg. Co., 58 Minn. 252; 5 Am. Elec. Cas. 739; 58 N. W. 1078; 49 Am. St. Rep. 507; Gahan v. Western Un. Teleg. Co. (U. S. C. C. D. Minn. 1894), 59 Fed. 433; 4 Am. Elec. Cas. 855.

[67] Western Un. Teleg. Co. v. Rogers, 68 Miss. 748; 9 So. 823.

[68] Morton v. Western Un. Teleg. Co., 53 Ohio St. 431; 34 Ohio L. Jour. 235; 41 N. E. 689.

[69] Curtin v. Western Un. Teleg. Co., 13 N. Y. App. Div. 253; 55 Alb. L. Jour. 264; 42 N. Y. Supp. 1109; 1 Am. Neg. Rep. 127, 128.

[70] Western Un. Teleg. Co. v. Brown, 71 Tex. 723; 2 Am. Elec. Cas. 812. In Gulf, Col. & S. F. Ry. Co. v. Levy, 59 Tex. 563; 46 Am. Rep. 278, it was held that the addressee could not recover, but that case is not now the law in that state. See also the following cases where the facts prevented recovery: Western Un. Teleg. Co. v. Lain, 87 Tex. 7. One who is neither the sender nor receiver of a telegram cannot recover where there is nothing to show that such person has any interest. Western Un. Teleg. Co. v. Fore (Tex. Ct. Civ. App. 1894), 26 S. W. 783; nor can the addressee recover for increased sickness of his wife and mental distress of his wife and himself, nor for expenses and loss of time in pursuit of a boy who had run away where a telegram, announcing such, had been delayed. Baldwin v. Western Un. Teleg. Co. (Tex. Civ. App.), 33 S. W. 890.

[71] Crawson v. Western Un. Teleg. Co. (U. S. C. C. W. D. Ark. 1891), 47 Fed. 544; 3 Am. Elec. Cas. 820; Western Un. Teleg. Co. v. Guest (Tex. Civ. App. 1895), 33 S. W. 281. $400 not excessive where addressee unable to see dying mother. Western Un. Teleg. Co. v. Newhouse, 6 Ind. App. 422; nor is such sum ex-

§ 1461. Verdicts—When excessive—Mental suffering.—Mental suffering as an element of damages whether connected with or separate from physical pain is equally difficult of admeasurement, and therefore various cases have arisen, in some of which verdicts have been declared to have awarded excessive damages, while in others the amounts awarded by the jury have been held not excessive. These decisions establish no guiding rule and are chiefly valuable for comparison of circumstances and are therefore given in the appended note. Damages, however, which are clearly the result of passion or prejudice will not be supported.[72]

cessive where addressee unable to attend burial of brother. Western Un. Teleg. Co. v. Johnson, 16 Tex. Civ. App. 546; 41 S. W. 367. $300 not excessive for inability to reach child before death. Western Un. Teleg. Co. v. Fisher (Ky. 1900), 54 S. W. 830. $125 is not excessive for inability to attend burial of brother. Curtin v. Western Un. Teleg. Co., 16 Misc. (N. Y.) 347; 38 N. Y. Supp. 58, rev'g 14 Misc. 459; 36 N. Y. Supp. 1111; 72 N. Y. St. R. 260; 76 Misc. L. N. Y. 347, was rev'd in 13 N. Y. App. Div. 253; 55 Abb. L. Jour. 264; 42 N. Y. Supp. 1109; 6 Am. Elec. Cas. 812, denying the right to recover for mental distress alone.

[72] Five thousand dollars is excessive for mother being unable to reach her son before latter's death. Western Un. Teleg. Co. v. Evans, 1 Tex. Civ. App. 301. Four thousand seven hundred and fifty dollars is excessive for her son being unable to reach his father before the latter became unconscious. Western Un. Teleg Co. v. Piner, 1 Tex. Civ. App. 301. Four thousand five hundred dollars beside the cost of transmission for negligent failure to deliver a message announcing the more serious condition of a child is not excessive. Two thousand one hundred and fifty dollars is not excessive for son being unable to reach his father before latter became unconscious. Western Un. Teleg. Co. v. Piner (Tex. Civ. App. 1804), 29 S. W. 66. Two thousand dollars not excessive for gross negligence of company whereby father was unable to reach his son before latter's death. Western Un. Teleg. Co. v. Houghton (Tex. Ct. Civ. App. 1894), 26 S. W. 448. One thousand nine hundred and fifty dollars not excessive where message delayed twenty-four hours and brother died before addressee could reach him. Western Un. Teleg. Co. v. Zane, 6 Tex. Civ. App. 585. One thousand five hundred and cost of transmission not excessive where by reason of nondelivery of telegrams summoning medical attendance, child was deprived thereof for more than one day and died. Western Un. Teleg. Co. v. Russel (Tex. Ct. Civ. App. 1895), 33 S. W. 708. One thousand dollars is not excessive where addressee was unable to reach his daughter before her death. Western Un. Teleg. Co. v. O'Keefe (Tex. Civ. App. 1895), 29 S. W. 1137. One thousand dollars not excessive where sister was unable to see her brother before his death. Western Un. Teleg.

§ 1462. Recovery for mental suffering—Law of place where injury occurs governs.—In a recent case in Texas the question arose whether, if there was a failure to transmit and deliver a telegram between points in a state where damages for mental suffering are not allowed, damages therefor could be recovered in another state which had acquired jurisdiction of the parties, and it was decided that they could not be recovered since the law giving immunity from certain damages is a substantial right and is governed by the law of the place where the injury occurs and not the law of the forum.[73]

Co. v. Trice (Tex. Civ. App. 1898), 48 S. W. 770. One thousand dollars, though addressee could have reached her dying half-sister a short time before she became unconscious and although she did attend her funeral. Western Un. Teleg. Co. v. Porter (Tex. Ct. Civ. App. 1894), 26 S. W. 866. Seven hundred and eighty dollars not excessive for error in stating in telegram that mother was dead, when sixty dollars was expended for flowers, etc., for funeral. Western Un. Teleg. Co. v. Hines (Tex. Civ. App. 1899), 54 S. W. 627. Five hundred dollars for want of baptism and spiritual consolation to sender's dying daughter is not excessive. Western Un. Teleg. Co. v. Robinson, 97 Tenn. 638. Five hundred dollars not excessive for failure to send telegram, announcing death of brother. Western Un. Teleg. Co. v. Hill (Tex. Civ. App. 1894), 26 S. W. 252; Western Un. Teleg. Co. v. Stratemeier, 11 Ind. App. 601. Five hundred dollars is excessive where father received another telegram in time to have reached his son before the latter died. Western Un. Teleg. Co. v. Mellon, 96 Tenn. 66; 33 S. W. 725. Four hundred and fifty dollars for nondelivery of telegram announcing death of child.

[73] Thomas v. Western Union Teleg. Co. (Tex. Civ. App.), 61 S. W. 501.

CHAPTER LVII.

INSURANCE.

§ 1463. Insurance — Amount of recovery — Adjustment — Damages — Measure of damages—Generally.
1464. Insurance — Distinction between the amount recoverable and damages.
1465. "Damage," qualified by contract.
1466. Adjuster and Adjustment—Agents or brokers.
1467. Agreements affecting losses or adjustment—Damages.
1468. Apportionment—Proportionate amounts—Several insurances — Separate articles or subjects.
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§ 1463. Insurance—Amount of recovery—Adjustment—Damages—Measure of damages—Generally.—One of the underlying principles of insurance is compensation, or indemnity for the loss sustained, based upon the contract, the premium

paid, the character of the risk, and the peril or hazard involved. These are not, however, the exclusive elements, since the effect of statutes, custom or usage, the right to limit liability, the principles peculiarly applicable to marine insurance, such as abandonment and constructive total loss, etc., are all material. There are also various other elements and underlying principles controlling the doctrine of indemnity as will be apparent from the rules stated and the decisions discussed throughout this chapter. In addition to the above, the distinction is important that life insurance is not a contract of indemnity and that accident insurance is not a contract of indemnity in all cases, nor does any contract of insurance contemplate that the insured shall ever be more than fully indemnified for any loss; so that, whether the question resolves itself into one of the amount recoverable or of damages and the measure thereof, this principle operates as a limitation.[1] It may, however, be generally stated that the market value of property destroyed measures the recovery, under a fire risk, so far as such value is within the limits of the policy

[1] See Joyce on Insurance (ed. 1897), secs. 3451-3465, and also the index therein covering the entire subject of indemnity; that is, the amount of recovery or measure of damages under general and particular headings. See also index therein upon the following subjects, amongst others: "Adjustment, damages;" "Measure of damages;" "Abandonment and total loss;" "Adjuster;" "Agreement;" "Amount of loss;" "Amount of recovery;" "Apportionment;" "Appraisal;" "Arbitration and award;" "Bankruptcy, insolvency, dissolution;" "Buildings;" "Cargo;" "Carrier, common carrier;" "Cattle;" "Collision;" "Commissions;" "Constructive total loss;" "Deduction;" "Defenses;" "Evidence;" "Excepted risks and losses;" "Expenses;" "Fraud;" "Freight;" "Funds;" "General average; Adjustment;" "General average and jettison;" "General average, jettison and adjustment; York-Antwerp rules;" "Goods;" "Indemnity;" "Jury;" "Liability;" "Limitation clauses affecting actions;" "Loss;" "Losses;" "Market value;" "Mortgagee;" "Mortgagor;" "Negligence;" "Notes," etc; "Notice; Proofs of loss, etc.;" "One third new;" "Partial loss;" "Payment;" "Perils;" "Premium;" "Presumption;" "Profits;" "Pro rata;" "Railroad;" "Recovery;" "Release;" "Repairs and rebuilding; Fire risk;" "Repairs, fifty per cent rule; Sale; Transshipment; Marine;" "Rights and remedies;" "Risk;" "Risks and Losses;" "Sale;" "Salvage;" "Ship;" "Shipowners;" "Statutes;" "Subrogation;" "Suicide;" "Time policies;" "Total loss and total disability;" "Usage;" "Valuation;" "Value;" "Valued policy;" "Valued policy law." See also as to amount of liability, 28 Cent. Dig. 2074 et seq. Value of subject-mat-

amount.[2] This general rule is, however, subject to such qualification as may be deduced from what has been above stated, and to such limitations as arise from the policy being a valued one, or from express limitation in the contract, or otherwise, and also to such exceptions as will hereinafter appear.

§ 1464. Insurance—Distinction between the amount recoverable and damages.—Insurance, except life insurance and accident insurance covering death, is a contract of indemnity for liability, damage, or loss by certain perils. Therefore, although the underlying, controlling principle is that of indemnity, yet the amount recoverable is that indemnity, which must rest upon the contract, and is commensurate with the loss sustained, or with the amount specified, as in the case of life insurance or valued policies. This principle of indemnity is, however, qualified in respect to the rule of one third new for old for repairs, in the cases of partial loss and particular average, in marine insurance. There are also certain incidents or corollaries to the principle of indemnity, such as the doctrines of constructive total loss, of abandonment, of subrogation, contribution and apportionment of loss, etc.[3] Damages, however, as we have elsewhere stated, contemplates an injury, and such injury is the basis of compensation or satisfaction, and an action to recover damages may be based on contract as in case of its breach, or on tort, or may rest upon statute, as in case of death by wrongful, etc, act, or of double and treble damages. So, although compensation and indemnity may be similar terms to a certain extent, yet that there is a distinction between the amount recoverable as an indemnity under an insurance contract, and the damages recoverable as compensation or satisfaction for an injury is obvious, whatever other analogy may exist. The amount recoverable, therefore, under an insurance

ter and determination of liability in general, id. sec. 1239; Valued policies, id. sec. 1240; Partial loss, id. sec. 1241; Insurance of part of value, id. sec. 1242; Extent of interest of insured, id. sec. 1243; Effect of other insurance, id. sec. 1244; Apportionment of loss, id. sec. 1245; Insurance of freight, id. sec. 1246; Successive losses, id. sec. 1247; Admissibility of evidence, id. sec. 1695.

[2] Hickerson v. German-American Ins. Co., 96 Tenn. 193; 33 S. W. 1041; 32 L. R. A. 172; 25 Ins. L. J. 422.

[3] Joyce on Ins. (ed. 1897) secs. 2, 24, 25, 29, 3078.

contract, as an indemnity for the loss as specified, should be distinguished from damages strictly defined, even though in certain cases the method of arriving at or of estimating the indemnity and of ascertaining damages may be qualifiedly analogous in principle.

§ 1465. "Damage" qualified by contract.—The contract in its entirety may qualify the meaning of the word "damage" so as to mean, not the amount of loss, but the recompense, as where the recovery is limited by the stipulation to a specified sum.[4] This applies to an open policy of insurance;[5] to memorandum articles;[6] and in other cases considered throughout this chapter.[7]

§ 1466. Adjuster and adjustment—Agents or brokers.—An adjuster, who is selected because of his special ability, skill and fitness, cannot delegate his authority by the appointment of a subadjuster, unless the insurer ratifies the act.[8] And a professional adjuster, open to employment by any and all companies, may follow his business without restriction.[9] Again, an adjuster, who is authorized to join with other adjusters in selling the damaged property after a loss, may ratify a sale made by another adjuster.[10] But, as a rule, the power or authority of an agent or broker to adjust a loss depends upon the extent of his actual or apparent authority, and whether it is limited to a particular loss or otherwise; usage of the place is also important,[11] and upon much the same principles depends the question of how far the adjustment of the loss by an agent or broker binds the in-

[4] Blinn v. Dresden M. F. Ins. Co. (Me. 1893), 27 Atl. 263.

[5] Barney v. Insurance Co., 3 Har. & J. (Md.) 139.

[6] See La Foncière, Compagnie D'Assurances, etc., v. Koons (7 U. S. C. C. A.), 75 Fed. 110; 71 Fed. 978; Washburn & M. Mfg. Co. v. Reliance M. Ins. Co., 179 U. S. 1; 21 Sup. Ct. Rep. 1; 50 U. S. App. 231; 27 C. C. A. 134; 82 Fed. 296.

[7] See Joyce on Ins. (ed. 1897) secs. 132, 176, 2507, 2716, 3163, 3421, 3454. See Hudson v. Scottish Un. & N. Ins. Co., 23 Ky. L. Rep. 116; 62 S. W. 513; Burkett v. Georgia Home Ins. Co., 105 Tenn. 548; 58 S. W. 848.

[8] Ruthven v. American F. Ins. Co. (Iowa, 1894), 60 N. W. 663.

[9] French v. People (Colo. 1895), 24 Ins. L. J. 678; 40 Pac. 463, contra, see Hooper v. People, 155 U. S. 648; 15 Super Ct. Rep. 207; 40 Cent. L. J. 228; Joyce on Ins. (ed. 1897) sec. 714.

[10] First Nat. Bk. v. Lancashire Ins. Co., 65 Minn. 462; 6 N. W. 1.

[11] Joyce on Ins. (ed. 1897) sec. 595.

surer. So the insurer may show that the adjustment is erroneous,[12] or the company may be estopped by the acts of its agent in adjusting and settling the loss;[13] and the authority of the agent or broker of the insured may be such as to make it his duty to settle the loss with reasonable diligence, or to make a speedy adjustment and collection of the amount due,[14] or there may be a ratification by the insurer of the agent's acts of adjustment.[15] But one employed by the insurer's adjuster to adjust the loss may recover from the company for services so rendered.[16] Again, upon failure of negotiations for an amicable adjustment of losses between insurer and assured, each is remitted to his original legal rights.[17]

§ 1467. Agreements affecting losses or adjustment—Damages.—Although there is an exception of liability under a specified per cent, the insurers may, by stipulation, be bound, nevertheless, to pay for their proportion of the salvage expenses.[18] And an agreement, to adjust average by British custom under the bill of lading, may preclude a recovery for general average loss;[19] or there may be an agreement by the insurer to bear a proportionate share of the expense of rebuilding or repairs in case of a loss by fire.[20] Again, if the stipulation, in an open policy of insurance, is that damages are to be estimated at the "true and actual cash value of the property at the time the loss may happen," this will be the rule of damages.[21] So where the insurance on cargo did not cover the loss of a certain article, but the insurer promised assured that if he would sell it to

[12] Bordes v. Hallett, 1 Caines (N. Y.), 444; Joyce on Ins. (ed. 1897) sec. 586.

[13] Fishbeck v. Phœnix Ins. Co., 54 Cal. 432; Joyce on Ins. (ed. 1897) sec. 586.

[14] Joyce on Ins. (ed. 1897) secs. 632, 676, 677.

[15] Joyce on Ins. (ed. 1897) sec. 462.

[16] Trebby v. Western Ins. Co., 83 Minn. 452; 86 N. W. 407. As to fees and expenses of arbitration, etc., see Alden v. Christianson, 83 Minn. 21; 85 N. W. 824.

[17] Natchez Ins. Co. v Stanton, 2 Smedes & M. 340; 41 Am. Dec. 592; Joyce on Ins. (ed. 1897) sec. 3454.

[18] Schultz v. Insurance Co., 1 B. Mon. (Ky.) 336; Joyce on Ins. (ed. 1897) sec. 2716.

[19] Stewart v. West Indian & P. S. S. Co., 42 L. J. Q. B. 84, aff'd 8 L. R. Q. B. 362; Joyce on Ins. (ed. 1897) sec. 3421.

[20] Parker v. Eagle Ins. Co., 9 Gray (Mass.), 152; Joyce on Ins. (ed. 1897) sec. 3163.

[21] Commonwealth Ins. Co. v. Sennett, 37 Pa. St. 205; 78 Am. Dec. 418; Joyce on Ins. (ed. 1897) sec. 3454.

the best advantage it would pay the deficiency, and insured complied, but the insurer refused to pay, it was held that the insured could recover the deficiency.[22] And an agreement may be made for estimating a partial loss or damage upon a specified basis of the true cash value, considering the age, condition and location of the property previous to the fire, the value of what is saved, deducting the difference between the value of new or replaced property and that insured or destroyed, and such agreement is not contrary to public policy, even if said insurance policy is a valued one.[23] So the fact that the property destroyed was patented cannot affect a contract to measure the damages by the value of the property at the time when the loss occurred.[24] But the parties to a contract cannot, it is decided, limit the right of the legislature to change the statutory liability, as where a subsequent statute restricts the liability of a railroad company for loss by fire communicated by its engines, in effect to the difference between the loss and the amount of insurance on the property.[25] The policy may, however, stipulate that the liability shall not exceed the actual cash value of the property at the time of the loss, and this would preclude damages beyond such limited amount; but damages may, nevertheless, be recovered in a less sum than said actual cash value.[26] And the value of the foundations and portions of the building not destroyed should be deducted from the total value of the building, under a policy with a similar provision.[27]

§ 1468. Apportionment—Proportionate amounts—Several insurances—Separate articles or subjects.—If it is stipulated that only such portion of the loss shall be recovered as the sum assured bears to the whole amount of insurance, this means the amount existing at the time of the loss.[28] And under a similar provision, where there are specific sums on separate items and

[22] Willetts v. Sun Mut. Ins. Co., 45 N. Y. 45; 6 Am. Rep. 31.

[23] Stemmer v. Scottish Un. & N. Ins. Co., 33 Or. 65; 53 Pac. 498; 27 Ins. L. J. 972.

[24] Commonwealth Ins. Co. v. Sennett, 37 Pa. St. 205; 78 Am. Dec. 418; Joyce on Ins. (ed. 1897) sec. 3454.

[25] Leavitt v. Canadian P. R. Co., 90 Me. 153; 37 Atl. 886; 38 L. R. A. 152.

[26] Osborn v. Phœnix Ins. Co. (Utah, 1901), 64 Pac. 1103.

[27] Burkett v. Georgia Home Ins. Co., 105 Tenn. 548; 58 S. W. 848.

[28] Quarrier v. Peabody Ins. Co., 10 W. Va. 507.

also other specific as well as blanket policies upon the property, and the loss is total and less than the total insurance, there should be an apportionment, by making the blanket policies specific and apportioning their amounts to each of the separate items with relation to their respective values, and ascertaining what proportion of the loss the policy amount in question bears to the total insurance on separate items.[29] And where compound policies cover the property, described in a policy with a like provision, to their full amount in case of a loss upon said property, and no loss upon the other property described in the compound policy, the recovery under the specific policy can be in no greater proportion than the amount in the specific policy bears to all the policies, compound and specific.[30] Again, under a like provision, coupled with the proviso applying in case the other insurance be valid or not, a policy avoided by transfer of the insured property is included in adjusting the loss.[31] If the liability is limited to a fractional, specified proportionate part, it should control to the exclusion of the recovery of the value of a destroyed building, by one who has a dower interest only.[32] And the recovery by an owner, where several insurances exist on his property to more than its value, is restricted to the value of such property.[33] Where, however, there is a separate amount on each of several classes of personal property, each class should be considered separately and the recovery on each item kept within the amount of the insurance and the value of the property.[34] And where a policy is issued for a specified amount, part of which covers household furniture and the balance other property, there can be a recovery for furniture, on the destruction of the property, only for the amount for which the furniture is insured, although its value exceeds such sum and the value of the other property is less than the amount of its insurance.[35]

[29] Chandler v. Insurance Co. of N. Amer., 70 Vt. 562; 41 Atl. 502.

[30] Page v. Sun Ins. Office (U. S. C. C. A. 8th C.), 36 U. S. App. 672; 20 C. C. A. 397; 74 Fed. 203; 33 L. R. A. 249; 25 Ins. L. J. 865.

[31] Lyons v. Smith, 36 App. Div. 627; 55 N. Y. Supp. 148.

[32] Home Ins. Co. v. Field, 42 Ill. App. 392.

[33] Millaudon v. Western M. Ins. Co., 9 La. 27; 29 Am. Dec. 433.

[34] Ætna Ins. Co. v. Glasgow Elec. L. & P. Co. (Ky. 1899), 52 S. W. 975.

[35] Phœnix Ins. Co. v. Pfeifer (Tex. Civ. App.), 39 S. W. 1001. See further as to apportionment; proportionate amounts; proportionate insurance; several insurers, etc.: Armour Packing Co. v. Reading F.

§ 1469. Proportionate amount—Other insurance—Of interest or value—Concurrent insurance—Amount of recovery. —Under a Lloyds policy, providing that the indemnitors are not to be liable for a greater proportion of any loss than the amount of their insurance bears to the whole insurance, they are not liable, where there is other insurance, to the whole amount of their subscriptions as they had not ratable satisfaction from other insurers.[36] But whether the proportionate amount of interest insured or the proportionate amount of value as limited by stipulation governs the measure of damages, depends largely upon the terms of the contract, and the relation which the amount of actual insurance bears to the proportionate interest. The element of concurrent insurance is also to be considered, as well as the estimated value in the policy, and the question of successive losses is also important, and it is decided that the liability is the proportionate amount where it is less than the proportionate interest of insured,[37] or the value of the interest insured, even though the whole amount of loss be less.[38] Again, where the company insures property for a certain sum, which is a proportionate amount of specific and concurrent insurance applied to different species of property, each having a specified sum annexed to it, and all amounting to a specific sum, the failure to prove the amount on each class of property or structure, when the loss is total, is not a ground for setting aside a judgment for plaintiff.[39]

§ 1470. Fraudulent inducement to take out a policy

Ins. Co., 67 Mo. App. 215; Armour v. Reading F. Ins. Co., 2 Mo. App. Rep. 1402; McCredy v. Thrush, 37 App. Div. 465; 56 N. Y. Supp. 68; Straus v. Hoadley, 23 App. Div. 360; 48 N. Y. Supp. 239; Catoosa Springs Co. v. Linch, 18 Misc. 209; 41 N. Y. Supp. 377; Golde v. Whipple, 7 App. Div. 48; 39 N. Y. Supp. 964; Orient Ins. Co. v. Moffatt, 15 Tex. Civ. App. 385; 39 S. W. 1013; Joyce on Ins. (ed. 1897) secs. 2705–2709, 3462. See also id. secs. 2017, 2018, 3455–3457, 3528 and index therein, "Other or double," etc., insurance; and as to simultaneous policies and notable contributions, see (id. secs. 2480, 2481, 2497) Carleton v. China Mut. Ins. Co. (Mass. 1899), 54 N. E. 559.

[36] Cook v. Loew, 69 N. Y. Supp. 614; 34 Misc. 276.

[37] Pacific Ins. Co. v. Catlett, 4 Wend. (N. Y.) 75; 1 Wend. (N. Y.) 561.

[38] Whiting v. Independent Ins. Co., 15 Md. 297. See Joyce on Ins. (ed. 1897) secs. 3460–3462 for a full discussion of this question.

[39] Improved Match Co. v. Michigan Mut. F. Ins. Co. (Mich. 1899), 80 N. W. 1088.

CHAPTER LVII.

INSURANCE.

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1484. Effect of valued policy—Value stated in application —Overvaluation.
1485. Valued policy law—Statute supersedes policy—Stipulation as to amount recoverable.
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1523. Fire risk—Cost of producing the property.
1524. Fire risk—Personal property, goods, etc.
1525. Fire risk—Concurrent insurance — Proportionate amount stipulated—No deduction of amount in settlement—Other insurers.
1526. Failure to save or protect property—Putting out fire —Separation of damaged, etc., goods.

§ 1476. Refusal to issue policy—Paid-up policy.—In case of a breach of a contract to issue a policy of fire insurance, the same damages may be recovered as if suing on the policy as agreed upon.[52] Damages may also be awarded, or specific performance enforced, in case of a parol agreement to insure and nonperformance thereof.[53] And where one is entitled to have a paid-up policy issued, the measure of damages is the value of the policy at the time of the demand and refusal, with interest.[54] Again, the amount of damages, for failure to deliver a paid-up policy, is not the amount of the premiums paid, for the action is not in disaffirmance of the contract, but it is the difference between the value of a paid-up policy and that of the life policy held by the plaintiff.[55] So, in such case, it is also held not to be the amount of the premiums paid less unpaid notes given, but the actual value of such policy.[56]

§ 1477. Refusal to allow assignment—Perpetual policy.—If an insurer wrongfully refuses to transfer a policy, he will be liable for the loss sustained by insured in consequence of such refusal, or the damages recoverable will be the cost of other insurance.[57] And if the contract is one of perpetual insurance, and it stipulates that an assignment may be allowed, and it is refused, and it is impossible to procure a similar perpetual policy, the measure of damages will be an amount, the interest on which will annually pay for the same amount of insurance on the property.[58]

§ 1478. Assignment of policy—Set-off—Deductions.—If assured assent to an assignment of a policy, reserving to them-

[52] Humphrey v. Hartford F. Ins. Co., 15 Blatchf. (C. C.) 25; Joyce on Ins. (ed. 1897) sec. 3454.

[53] Security F. Ins. Co. v. Kentucky M. Ins. Co., 7 Bush (Ky.), 81; 3 Am. Rep. 301; Western Assurance Co. v. McAlpin (Ind. App. 1899), 55 N. E. 119; Joyce on Ins. (ed. 1897) sec. 38 and cases cited.

[54] Rumbold v. Pennsylvania Mut. L. Ins. Co., 7 Mo. 71. See Mutual L. Ins. Co. v. Bratt, 55 Md. 200; Nashville L. Ins. Co. v. Matthews, 8 Lea (Tenn.), 499; Joyce on Ins. (ed. 1897) secs. 1194, 1195.

[55] American Life Ins. Co. v. Shultz, 82 Pa. St. 46; Joyce on Ins. (ed. 1897) sec. 3454.

[56] Phœnix, etc., L. Ins. Co. v. Baker, 85 Ill. 410; Joyce on Ins. (ed. 1897) sec. 3454.

[57] Joyce on Ins. (ed. 1897) secs. 3483, 3484.

[58] So held in Marshall v. Franklin F. Ins. Co. (C. P.), 13 Lanc. L. Rev. 169.

selves the rights expressed therein, this includes the right to set off, as against a loss payable to the assignee, such premium, notes, debts, etc., due from the assignor as are within the terms of the policy and reservation. So, in case of an equitable assignment, all claims due from insured may be set off which are properly subject thereto, although this does not preclude the doctrine of estoppel against the insurer. And in case of assignment after loss, the right of set-off exists.[59]

§ 1479. Wrongful cancellation or termination of policy.—The measure of damages for wrongful cancellation of a policy, where the assured elects to take back his money with interest, is the amount actually paid, with interest.[60] And where a fire policy insures "forever" the insured and his assigns, and it is wrongfully terminated, the cost of a new policy in another company may be recovered from the old insurer.[61]

§ 1480. Same subject—Refusal to receive premiums or to continue policy.—Where there is a refusal to receive premiums, under a life policy giving the right to pay the same annually and to continue the insurance, the measure of damages is the amount of premiums paid with interest on each from the time of payment, the company also refusing to continue the insurance.[62] It is also decided that the measure of indemnity for refusal to receive a premium is the amount of the premiums paid, and is not limited to the surrender value.[63]

§ 1481. Mutual benefit associations, etc.—Wrongful ex-

[59] Joyce on Ins. (ed. 1897) secs. 2356, 3456.

[60] Burriss v. Life Ins. Co., 124 N. C. 9; 32 S. E. 323.

[61] Marshall v. Franklin Fire Ins. Co., 176 Pa. 628; 38 W. N. C. 473; 35 Atl. 204; 34 L. R. A. 159. But see as to wrongful cancellation or termination of contract by insurer, Joyce on Ins. (ed. 1897) sec. 1659, where what seems to be the result of the decisions is stated to be that the policy holder has three remedies; (1) To consider the policy terminated and recover its just value in a proper action therefor. (2) To institute an equitable proceeding to adjudge the policy in force, and the question of forfeiture could then be determined. (3) To tender the premiums, and when the policy becomes payable, an action may be brought upon the policy and the question of forfeiture be then tested.

[62] Alabama Gold L. Ins. Co. v. Garmany, 74 Ga. 51; Joyce on Ins. (ed. 1897) sec. 3454.

[63] Suess v. Imperial L. Ins. Co., 64 Mo. App. 1; 2 Mo. App. Rep. 830.

pulsion.—A member wrongfully expelled may recover damages therefor equal to the amount paid as assessments or dues.[64]

§ 1482. Refusal to pay loss—Penalty—Attorney's fees.—A statute providing for damages and attorney's fees, in addition to the amount of insurance, where a life company fails to pay a loss within the time stipulated and after demand therefor is constitutional.[65] So a reasonable attorney's fee may be taxed as costs to plaintiff, on judgment rendered against the insurer on a policy on real property.[66] And where the Code so provides, the refusal of the insurer in bad faith to pay its policies entitles the policy holder to recover twenty-five per cent as damages, in addition to the amount of the policy, and this applies when, as against the assured's legal representatives, the insurer's agent shows active sympathy with another claimant of the proceeds, and refuses payment until the latter's claims are satisfied; such acts also constitute bad faith within said code.[67] But acting in bad faith, or interposing a defense without merit, is not a ground for assessment of damages and attorney's fees against an insurance company when not warranted by the facts disclosed.[68] Nor can damages and attorney's fees be collected, under the Code,[69] in such case, where the questions of law raised in defense are such as to preclude any imputation of unfair dealing.[70] Nor will damages be awarded, where the insurer is sincere in its contention that under certain statutes it is exempt from liability.[71]

[64] Slater v. Supreme Lodge K. & L. of H., 76 Mo. App. 387; 1 Mo. App. Rep. 536. See Joyce on Ins. (ed. 1897) secs. 1456, 3520, and index therein, "Member;" "Mutual benefit associations," etc.

[65] Fidelity & C. Ins. Co. v. Allibone, 15 Tex. Civ. App. 178; 39 S. W. 632, writ of error refused, 90 Tex. 660; 40 S. W. 399. Kansas statute (Sess. Laws, 1893, ch. 102, sec. 3), providing for attorney's fee is constitutional. Shawnee F. Ins. Co. v. Bayha (Kan.), 55 Pac. 474; British-American Assur. Co. v. Bradford, 60 Kan. 82; 55 Pac. 335; 28 Ins. L. J. 262.

[66] American F. Ins. Co. v. Landfare, 56 Neb. 482; 76 N. W. 1068, statute authorizes such attorney's fee.

[67] Mutual L. Ins. Co. v. Watson, 30 Fed. 603; Ga. Code, sec. 2850; Joyce on Ins. (ed. 1897) sec. 3454.

[68] Morris v. Imperial Ins. Co., 106 Ga. 461; 32 S. E. 595; 28 Ins. L. J. 402.

[69] Ga. Civ. Code, sec. 2140.

[70] Phœnix Ins. Co. v. Clay, 101 Ga. 331; 28 S. E. 853.

[71] Jarman v. Knights Templars' & M. L. I. Co. (U. S. C. C. W. D. Mo.) 95 Fed. 70; 28 Ins. L. J. 874. As to formal and affirmative proof of re-

And an instruction, under the statute,[72] providing for additional damages in such cases, is erroneous where it is technically inaccurate, as not being in conformity with the provisions of the enactment.[73] Again, where a policy is contracted to be paid in annual installments for a period of years, and there is a refusal to pay, or to furnish the necessary form for proof of death, a judgment should not be given for the full amount of the policy, but only for the installments as they mature, there being no demand for commutation. But under the statutes[74] the failure to pay within the specified time renders the insurer liable for twelve per cent damages on the loss and a reasonable attorney's fees.[75] But a statute has no application to accident insurance, which provides that in cases of life or health insurance and failure to pay a loss in the time specified, a certain per cent of the amount shall be recoverable as additional damages and also the attorney's fees for collection.[76] Again, there must be an averment and proof of demand and refusal to pay a policy in order to recover attorney's fees.[77]

§ 1483. Mutual benefit associations, etc.—Failure to levy assessment.—It is decided that the measure of damages, for failure of such an association to levy an assessment, is the amount which would actually have been collected and received had the assessment been properly made and collected.[78] But it is also determined that only nominal damages are recoverable in case of such refusal.[79]

§ 1484. Effect of valued policy—Value stated in application—Overvaluation.—A valued policy estimates not merely

fusal to pay not being necessary to recover penalty under Missouri statute, see Blackwell v. American Cent. Ins. Co., 80 Mo. App. 75; 2 Mo. App. Rep. 516.

[73] Mo. Rev. Stat. 1889, sec. 5927.

[74] Ramsey v. Philadelphia Under. Assn., 71 Mo. App. 280.

[74] Rev. Stat. 1895, art. 3071.

[75] New York L. Ins. Co. v. English (Tex. Civ. App. 1902), 70 S. W. 441, rehearing id 442.

[76] Fidelity & Cas. Ins. Co. v. Dorough (U. S. C. C. A. Tex.), 46 C. C. A. 364; 107 Fed. 389.

[77] Ancient Order U. W. v. Brown, 112 Ga. 545; 37 S. E. 890.

[78] Dillingham v. New York Cotton Exch. (U. S. C. C. S. D. N. Y.) 49 Fed. 719; Joyce on Ins. (ed. 1897) sec. 3473.

[79] Joyce on Ins. (ed. 1897) sec. 3473. See also index therein, "Assessments and dues;" "Member;" "Mutual benefit associations," etc.

the value of the property or interest insured, but values the loss and is equivalent to an assessment of damages, or is in the nature of liquidated damages in case of loss. As a general rule a valued policy is conclusive of the value of the subject covered, and assured is entitled to recover the whole amount of the valuation in the policy, in case of total loss by the perils insured against, unless the valuation is fraudulent, or enormously excessive, or unless the policy be a wager. This rule, however, only applies as between parties to the same policy. The value stated in the application also binds the parties, and, after the loss, the assured is not at liberty to show that the property was in fact worth a much greater sum. If the same valuation is fixed under two policies upon the same subject, the insured is conclusively bound and cannot show a greater value. An overvaluation is, as a rule, conclusive upon the parties in the absence of fraud; but the overvaluation may be such, however, as to raise a presumption of fraud, although there is a distinction between a mere unintentional overestimation and an overvaluation knowingly made, as well also as between an overvaluation and a slight overestimation. Again, the words "valued at——" the blank being unfilled, are not conclusive.[80] Where the statute precludes taking a risk at a greater amount than three fourths

[80] Joyce on Ins. (ed. 1897) secs. 159–168. See also index therein. "Valuation;" "Value;" "Valued at;" "Valued freight;" "Valued policy;" "Valued policy law;" "Values;" "Overvaluation;" "Policy;" "Statutes." See Phœnix Ins. Co. v. McLoon, 100 Mass. 475; Forbes v. Manufacturers Ins. Co., 1 Gray (Mass.), 371; Lockwood v. Sangamo Ins. Co., 46 Mo. 71; Sturm v. Atlantic Mut. Ins. Co., 63 N. Y. 77; Whitney v. American Ins. Co., 3 Cow. (N. Y.) 210; Portsmouth Ins. Co. v. Brazee, 16 Ohio, 81; Howell v. Protection Ins. Co., 7 Ham. (Ohio) 284; Griswold v. Union Ins. Co., 3 Blatchf. (U. S.) 231; Fed. Cas. No. 5840; Mutual Safety Ins. Co. v. Cargo, Olcott (U. S.), 89; Fed. Cas. No. 998; Hancox v. Fishing Ins. Co., 3 Sumn. (U. S.) 132; Fed. Cas. No. 6013; Alsop v. Commercial Ins. Co., 1 Sumn. (U. S.) 451; Fed. Cas. No. 262; Watson v. Insurance Co. of N. Amer., 3 Wash. (U. S. C. C.) 1; Fed. Cas. No. 17,286; Carson v. Marine Ins. Co., 2 Wash. (U. S. C. C.) 468; Fed. Cas. No. 2465; Marine Ins. Co. v. Hodgson, 6 Cranch (U. S.), 206; 3 L. Ed. 200; Snell v. Delaware Ins. Co., 1 Wash. (U. S. C. C.) 509; Fed. Cas. No. 13137. Premium is to be included. Orrok v. Commonwealth Ins. Co., 21 Pick. (Mass.) 456; 32 Am. Dec. 271; Hall v. Ocean Ins. Co., 21 Pick. (Mass.) 472.

the value of the property, fixing the value in such case makes the policy a valued one and conclusive.[81]

§ 1485. Valued policy law—Statute supersedes policy—Stipulation as to amount recoverable.—Where the statute makes all policies covering realty valued policies, that is that the value in the policy on which the premium is paid is the value to be paid in case of loss, a limitation of liability to three fourths the value of the property does not apply.[82] Under the Mississippi statute,[83] the scheme of the statute is to provide that in case of total loss of property, real or personal, except personal property constantly changing in specifics and quantity, the insurer shall pay the amount named in the policy—the amount upon which as a basis, the premium has to be calculated and received—and that in case of a partial loss of real or personal property except personal property constantly changing in specifics and quantity, the company shall pay the amount of actual damage, not to exceed the amount of the policy; again making the company possibly liable, according to the extent of the damage, on the basis of the amount on which it has received premiums. It could not be known in advance how great or small the damage would be in case of a partial loss, and hence no sum could be named as the measure of a partial loss; and consequently, since there was no sum the parties could agree on as the measure of the partial loss, there could be no contract to pay any specific sum, but the amount to be paid must be measured by the actual damage—nor to exceed in the case of any company, the amount named in the policy. The insured might recover up to the amount on the basis on which the premiums had been calculated, but could never recover from different companies two or three times the value of the property destroyed, as in case of a total loss, since there could be, in the nature of things, no fixation of the amount of partial loss, as there easily could be of the amount of a total loss, and lastly the statute provides that in case of personal property constantly

[81] Gibson v. Missouri Town Mut. Ins. Co., 82 Mo. App. 515.

[82] Germania Ins. Co. v. Ashby, 23 Ky. L. Rep. 1564; 65 S. W. 11. As to valued policy law, see Joyce on Ins. (ed. 1897) secs. 163, 3026–3029. See also note 53, Cent. L. Jour. 105.

[83] Laws, 1894, ch. 63, sec. 1, as Am'd Laws, 1896, ch. 56.

changing in specifics and quantity, the company should pay the actual value of the property destroyed, not to exceed the amount of the policy. The same thought, precisely, is manifest here as in the two previous cases. The insured must be made whole. The actual value of the property destroyed may be recovered, provided that amount does not exceed the amount named in the policy,—the amount, again, on the basis of which the premium has been calculated. The two things clearly deducible from the statute are these: First, the insured must, at all events, in each of the three cases named, recover the amount of his actual loss; that loss being fixed in the first class, but not susceptible of fixation in the two second classes of property. Second, that the company must always pay on the basis of the amount on which it has received premiums,—only the actual damage or loss, of course, in the two last cases, but, nevertheless, that whole loss up to the limit named; the amount of the policy; the amount on which the premium has been calculated, and the statute governs notwithstanding express conditions in the policy expressly naming the full benefit of the law and providing for a different measure of liability in case of loss, so that the amount of the policy could nevertheless be recovered.[84]

§ 1486. Loss of goods by fire—Master's report as to value of great weight, etc.—In matters of conflicting evidence as to the value of a stock of goods before and after a fire, the master's conclusions thereon are not only entitled to great weight on review by the court, but should be accepted unless manifestly erroneous; especially so, where it is apparent that the master has applied to the evidence careful consideration and an impartial judgment.[85]

§ 1487. Estimate of value before and after fire—When inclusive of goods totally destroyed.—Where the value of the entire stock of goods on hand just before the fire, and the value of goods after the fire is taken, this will include the value of

[84] Hartford Fire Ins. Co. v. Shlenker (Miss. 1902), 32 So. 155, language is for the greater part that of Whetfield, C. J. See Joyce on Ins. (ed. 1897) secs. 163, 3026-3029.

[85] Reading Ins. Co. v. Egelhoff (U. S. C. C. W. D. Mo.), 115 Fed. 393.

the goods totally destroyed, and the value of the goods actually remaining after the fire will show the amount of the loss.[86]

§ 1488. Fire risk—Sale of goods at auction—How far evidence of value.—Where the insured proceeds to sell goods at auction against the protest of the insurance companies, the insured cannot by such sale insist that the price realized thereat binds the insurers, and prevents their sharing the actual market value by evidence aliunde. The amount realized might, however, be admissible as evidence, but it is not conclusive.[87]

§ 1489. Breach of contract by insolvency of insurers—Deductions—Set-off.—In case of a death or loss by fire, after dissolution of the company, the value of the policy at the time of dissolution is the basis of recovery,[88] or, in case of a loss by fire after appointment of a temporary receiver, the measure of damages is the present value of the appraised amount of the loss, due sixty days thereafter, as of the date when the permanent receiver was appointed.[89] And generally, in case of insolvency and consequent breach of contract, the value of the policy at the date of dissolution measures the damages,[90] or the present value of the policy, without regard to insured's health, to be estimated according to the tables of mortality, of standard use in insurance, less any outstanding premium notes.[91] But a different rule obtains in cases where railway and other corporations are insured against damages resulting from losses to property, or employees, or passengers, or others, and the loss so sustained is actually paid by insured before receivers are appointed. In such case the amount recoverable is a sum of money equal to the sum of the loss and the return of the unearned premium. If the loss happens before the insolvency, the policy holder is entitled to prove a sum equal to the loss or damages paid by

[86] Reading Ins. Co. v. Egelhoff (U. S. C. C. W. D. Mo.), 115 Fed. 393, 395.

[87] Reading Ins. Co. v. Egelhoff (U. S. C. C. W. D. Mo.), 115 Fed. 393, 396.

[88] Joyce on Ins. (ed. 1897) sec. 3595.

[89] People v. Highland Mut. F. Ins. Co., 56 N. Y. Supp. 83; 26 Misc. 205.

[90] People v. Security L. Ins. & A. Co., 78 N. Y. 114; 34 Am. Rep. 522; Casualty Ins. Co.'s Case, 82 Md. 535; Joyce on Ins. (ed. 1897) sec. 3595.

[91] Commonwealth Atty. Genl. v. American L. Ins. Co., 162 Pa. 586; 29 Atl. 660; 23 Ins. L. J. 739, appeal dismissed 29 Atl. 707, 908.

him, less the return premium, if any.[92] Again, premium notes are to be deducted; and the amount due on an endowment policy, payable in any event at a fixed time, and sooner if the party dies before said time, should, in settling the company's affairs, be set off against the amount due on a mortgage debt from the holder of the policy to the company, by way of compensation or reconvention. So the contingent interest of the survivors, entitled as beneficiaries, is fixed by the insolvency, to be determined by the tables ordinarily used for that purpose.[93] It has also been decided that the insurer is entitled to such an amount as would purchase a similar policy in a solvent company, to be ascertained by treating the difference between the premiums paid the defendant company, and those paid for the reinsurance as an annuity for plaintiff's expectation of life, and calculating its cash value.[94] If the age and health of assured would preclude another insurance, the claim should be valued as a death claim.[95] But where insured has surrendered a policy, and received a new one therefor, he can only recover an amount based on the value of the new policy at the time of insolvency.[96] Again, the insolvency of a credit insurance company may constitute such a breach of contract as to enable assured to recover as on a quantum meruit, even without compliance with the policy conditions as to proofs of losses.[97]

§ 1490. Termination of insurer's business and transfer to new company—Measure of damages to insured.—On the termination of its business by a life insurance company and the transfer of its assets and policies to another company, each policy holder may, if he desires, terminate his policy and maintain an action to recover from the assets such sum as he may be equitably entitled to receive, and the measure of damages

[92] Casualty Ins. Co.'s Case, 82 Md. 535; Joyce v. Ins. (ed. 1897) sec. 3595.

[93] Carr v. Hamilton, 129 U. S. 252; 32 L. Ed. 669; 9 Sup. Ct. Rep. 295.

[94] Universal L. Ins. Co. v. Binford, 76 Va. 103; In re Albert L. Assn., 9 L. R. Eq. 708; 39 L. J. Ch. 539; Joyce on Ins. (ed. 1897) sec. 3595.

[95] People v. Knickerbocker L. Ins. Co., 40 Hun (N. Y.), 44; Joyce on Ins. (ed. 1897) sec. 3595.

[96] Attorney Genl. v. Continental L. Ins. Co., 91 N. Y. 647.

[97] Smith v. National Credit Ins. Co., 65 Minn. 283; 68 N. W. 28; 33 L. R. A. 511; 25 Ins. L. J. 842.

will be the amount of premiums paid less the value of the insurance of which he has enjoyed the benefit, the general rule being that where one party to an executory contract prevents its performance, or puts it out of his own power to perform the same, the other party may regard it as terminated, and demand whatever damages he has sustained thereby.[98]

§ 1491. Wrongful diversion of trust funds of fraternal order.—If there is a wrongful diversion of the trust funds of a fraternal order at large, resulting from a common understanding, former members of a subordinate lodge, although they received no portion thereof, are jointly liable with those who did.[99]

§ 1492. Marine insurance—Generally.—In marine insurance the damages recoverable may depend upon whether the loss is an actual total loss,[100] or not,[1] although there may be a recovery

[98] Lovell v. St. Louis Mut. L. Ins. Co., 111 U. S. 264; United States v. Behan, 110 U. S. 339, affirmed. See Joyce on Ins. (ed. 1897) secs. 1408, 1644, 3595.

[99] Grand Lodge K. of P. v. Germania Lodge No. 50, 56 N. J. Eq. 63; 38 Atl. 341. See generally Joyce on Ins. (ed. 1897) and index therein, "Funds."

[100] See Dunning v. Merchants Mut. M. Ins. Co., 57 Me. 108; Prince v. Ocean Ins. Co., 43 Me. 481; 63 Am. Dec. 676; Walker v. Protection Ins. Co., 16 Shep. (Me.) 317; French v. Hope Ins. Co., 16 Pick. (Mass.) 397; Sawyer v. Maine F. Ins. Co., 12 Mass. 291; Bradhurst v. Columbian Ins. Co., 9 Johns. (N. Y.) 9; Walker v. United States Ins. Co., 11 Serg. & R. (Pa.) 61; Insurance Co. v. Fogarty, 19 Wall. (U. S.) 640; Columbian Ins. Co. v. Cutlett, 12 Wh. (U. S.) 383; Bradlie v. Maryland Ins. Co., 12 Pet. (U. S.) 378; Hall v. Ocean Ins. Co., 37 Fed. 371; Semmes v. Hartford F. Ins. Co., 13 Wall. (U. S.) 158; 20 L. Ed. 490; Bullard v. Roger Wiliams Ins. Co., 1 Curt. (U. S.) 148; Fed. Cas. No. 2122; Williams v. Suffolk Ins. Co., 3 Sumn. (U. S.) 510; Fed. Cas. No. 17,739; Robinson v. Commonwealth Ins. Co., 3 Sumn. (U. S.) 230; Fed. Cas. No. 11,949. See as to total loss, Joyce on Ins. (ed. 1897) secs. 1394, 1619, 2707 note, 2710, 2792, 2892–3018, 3052, 3123–3125, 3241, 3451, 3454, 3455, 3538, 3771, etc.

[1] See Williams v. Kennebec Mut. Ins. Co., 31 Me. 455; Barney v. Maryland Ins. Co., 5 Har. & J. (Md.) 139; Sewall v. U. S. Ins. Co., 11 Pick. (Mass.) 90; Young v. Pacific Mut. Ins. Co., 2 Jones & S. (N. Y.) 321; Ruckman v. Merchants L. Ins. Co., 5 Duer (N. Y.), 342; Smith v. Universal Ins. Co., 6 Wh. (U. S.) 176; Morean v. U. S. Ins. Co., 1 Wh. (U. S.) 219; Monroe v. British & Foreign M. Ins. Co., 5 U. S. App. 179; 3 C. C. A. 280; 52 Fed. 777; Church v. Marine Ins. Co., 1 Mason (U. S.), 341; Fed. Cas. No. 2711.

as for a partial loss.[2] So, in case of freight, the question is material whether there is an actual total loss,[3] or not,[4] or whether there is only a partial loss.[5]

§ 1493. Marine insurance—Collision—Negligence—Repayment—Damages paid by insured.—Under a policy insuring against the usual perils of the sea, including barratry, the underwriters are not liable to repay to the insured damages paid by him to the owners of another vessel and cargo, suffered in a collision occasioned by the negligence of the master or mariners of the insured vessel.[6]

§ 1494. Marine insurance—Adjustment—Usage.—The adjustment of the loss, if so stipulated, must be made according to the usages of Lloyd's, and the place of performance being expressly made in England, the law of that country governs.[7]

§ 1495. Marine insurance—Abandonment and total loss.—The purpose of an abandonment is to make that a total loss which would not otherwise be one. The word implies that there

[2] See Globe Ins. Co. v. Sherlock, 25 Ohio St. 50; Donath v. Ins. Co. of North Amer., 4 Dall. (U. S.) 463; 1 L. Ed. 910; Russell v. Union Ins. Co., 4 Dall. (U. S.) 421; 1 L. Ed. 892; Joyce on Ins. (ed. 1897) and index therein, "Partial loss."

[3] See Willard v. Millers & Mfrs. Ins. Co., 30 Mo. 35; Robertson v. Atlantic M. Ins. Co., 68 N. Y. 192; Huth v. New York Mut. Ins. Co., 8 Bosw. (N. Y.) 538; De Longuemere v. New York F. Ins. Co., 10 Johns. (N. Y.) 201; Abbott v. Broome, 1 Caines' Cas. (N. Y.) 292; 2 Am. Dec. 187; Hugg v. Augusta Ins. & Bkg. Co., 7 How. (U. S.) 595; Fed. Cas. No. 6838; Hurton v. Union Ins. Co., 1 Wash. (U. S. C. C.) 530; Fed. Cas. No. 6942. See as to freight, Joyce on Ins. (ed. 1897) and index therein, "Freight."

[4] See Parsons v. Manufacturers Ins. Co., 16 Gray (Mass.), 463; Lord v. Neptune Ins. Co., 10 Gray (Mass.), 109; Hubbell v. Great Western Ins. Co., 74 N. Y. 246, rev'g 10 Hun, 167; Saltus v. Ocean Ins. Co., 14 Johns. (N. Y.) 138; Murray v. Ætna Ins. Co., 4 Biss. (U. S.) 417; Fed. Cas. No. 9955; Morgan v. Ins. Co. of North Amer., 4 Dall. (U. S.) 455; 1 L. Ed. 907.

[5] See Merchants Mut. Ins. Co. v. Butler, 20 Md. 41; McGraw v. Ocean Ins. Co., 23 Pick. (Mass.) 405; Fiedler v. New York Ins. Co., 6 Duer (N. Y.), 282; Stillwell v. Home Ins. Co., 3 Dill. (U. S.) 80; Fed. Cas. No. 13,450. See Joyce on Ins. (ed. 1897) and index therein, "Freight" and "Partial loss."

[6] General Mut. Ins. Co. v. Sherwood, 14 How. (U. S.) 351.

[7] London Assurance v. Companhia de Moagens, etc., 167 U. S. 149; 17 Sup. Ct. Rep. 785, aff'g 15 C. C. A. 379; 68 Fed. 247.

is something surviving, some part interest or claim existing which may be abandoned, and that the underwriter, upon the transfer or cession by assured of his rights, title and interest in the thing insured, shall pay the amount thereof, saving to himself such recompense as he can out of the effects abandoned. The principle of indemnity requires this cession to the underwriter and thereupon he stands in assured's place. The doctrine of constructive total loss precludes more than a full indemnity to the assured. There is also a distinction between an absolute and constructive total loss and the insured has his election to abandon or not in his discretion, or he may use his own exertions to preserve the property or await the final event to recover for a total or partial loss as the case may be. He must, however, elect to abandon in order to recover for a constructive total loss. If there is an absolute total loss an abandonment is unnecessary.[8] But the shipowner is not precluded recovering as for a total loss, by a return of the insured vessel, after commence-

[8] See as supporting the text and generally, Joyce on Ins. (ed. 1897) secs. 2892–3018; Canada Sugar Ref. Co. v. Insurance Co. of N. Amer., 175 U. S. 609; 44 L. Ed. 178; 20 Sup. Ct. Rep. 239 (rev'g Insurance Co. of N. Amer. v. Canada Sugar Ref. Co., 31 C. C. A. 65; 87 Fed. 491); Washburn & M. Mfg. Co. v. Reliance M. Ins. Co., 175 U. S. 1; 45 L. Ed. 49; 21 Sup. Ct. Rep. 1; Richelieu & O. Nav. Co. v. Boston M. Ins. Co., 136 U. S. 408, 434; Orient Ins. Co. v. Adams, 123 U. S. 67; Insurance Co. v. Piaggio, 16 Wall. (U. S.) 378; Copelin v. Insurance Co., 9 Wall. (U. S.) 461; Propeller Niagara v. Cordes, 21 How. (U. S.) 7; The Catharine v. Dickinson, 17 How. (U. S.) 170; Patapsco Ins. Co. v. Southgate, 5 Pet. (U. S.) 604; Columbian Ins. Co. v. Ashby, 4 Pet. (U. S.) 139; Comegys v. Vasse, 1 Pet. (U. S.) 193; Olivera v. Union Ins. Co., 3 Wh. (U. S.) 183; Marcardier v. Chesapeake Ins. Co., 8 Cr. (U. S.) 39; Livingston v. Maryland Ins. Co., 7 Cr. (U. S.) 506; Maryland Ins. Co. v. Ruden, 6 Cr. (U. S.) 338; Chesapeake Ins. Co. v. Stark, 6 Cr. (U. S.) 268; Rhinelander v. Insurance Co., 4 Cr. (U. S.) 29; Gilchrist v. Chicago Ins. Co. (U. S. C. C. A. Ill.) 44 C. C. A. 43; 104 Fed. 566; The St. Johns (U. S. D. C. N. Y.), 101 Fed. 469; Harvey v. Detroit F. & M. Ins. Co., 120 Mich. 601; 79 N. W. 898; 6 Det. L. N. 353; 28 Ins. L. J. 834; Devitt v. Providence Washington Ins. Co., 61 App. Div. 390; 70 N. Y. Supp. 654; Jones v. Western Assur. Co., 198 Pa. St. 206; 47 Atl. 948; Mason v. Marine Ins. Co. (U. S. C. C. A. Mich.) 49 C. C. A. 106; 110 Fed. 452; 54 L. R. A. 700; The Blairmore, 67 L. J. P. C. 96; [1899] App. Cas. 593; 79 L. J. N. S. 217; 8 Ark. 429; Musgrave v. Mannheim Ins. Co. (Can.), 32 N. S. 405. See also 28 Cent. Dig. cols. 2000–2060, secs. 1192–1227. As to abandonment under Commercial Code, art. 216, see Resal v. Compagnie Gen. Trans. (Tribunal Civ. De La Seine) 32 Chic. L. News, 17; 18 Nat. Corp. Rep. 906.

ment of an action upon the policy, subsequent to a notice of abandonment refused, where the policy covered war risks and the ship was captured while carrying contraband of war.[9] If, however, the master is part owner, the insurers are not liable as for a total loss, in case of an injury from one of the perils insured against, to more than half the value of the vessel, where a sale is made by the master under circumstances which would not authorize him to sell as master.[10] And merchandise, discharged at a port of detention before the accident, is not included in an abandonment, the risk having ceased.[11]

§ 1496. Constructive total loss—Allowance for custody during repairs of vessel.—In the estimation of a constructive total loss a fair allowance should be made for the custody of the vessel during repairs, there being a clause in the policy providing for the estimation of a constructive total loss upon the basis as of a partial loss.[12]

§ 1497. Marine insurance—Partial loss—Recovery and damages—Expenses.[13]—If a partial loss is incurred, the insurer pays only such proportion of the actual loss as the sum insured bears to the value of the property at risk;[14] and the value of sound goods may be proven, and also the appraisement, the sale of damaged goods at auction, and the custom of merchants in relation to said sale.[15] But it is not necessary to sell the damaged goods to determine the amount of loss. It may be estimated by appraisers and the importation cost will be the standard of damage,[16] although the policy may stipulate that the damages shall be estimated by a separation and sale of the damaged

[9] Ruys v. London Assur. Corp. [1897] 2 Q. B. 135; 66 L. J. Q. B. N. S. 534; 77 Law T. Rep. 28.

[10] Pierce v. Ocean Ins. Co., 18 Pick. (Mass.) 83; 29 Am. Dec. 567; Joyce on Ins. (ed. 1897) sec. 3454.

[11] Atlantic & L. S. R. Co. v. Indemnity Mut. Assur. Co., Rap. Jud. Quebec, 15 C. S. 476.

[12] So held in Hall v. Ocean Ins. Co., 21 Pick. (Mass.) 472; Joyce on Ins. (ed. 1897) sec. 3102.

[13] See Joyce on Ins. (ed. 1897) secs. 1394, 2714, 2912, 2922, 2938-2941, 3015, 3016, 3068, 3077, 3099, 3408, 3452, 3454.

[14] Western Assur. Co. v. Southwestern Transp. Co. (U. S. C. C. A. 5th C.), 30 U. S. App. 373; 16 C. C. A. 65; 68 Fed. 923; Joyce on Ins. (ed. 1897) sec. 3454.

[15] Stanton v. Natchez Ins. Co., 5 How. (Miss.) 744.

[16] Stewart v. Western Ins. Co., 11 La. 53.

goods.[17] If the goods are covered by a valued policy, the measure of the insurer's liability is the proportion which the loss bears to the sound value at the port of discharge.[18] But under such a policy, a custom will govern resident parties to pay the difference between the stipulated price in the policy and the sale price of the injured article.[19] Again, expenses for seamen's wages, provisions and extra pilotage, during an embargo on a vessel, are recoverable, as a partial loss from the insurer on freight.[20]

§ 1498. General average — Adjustment—Generally.[21]—To constitute a general average loss there must be a sacrifice or extraordinary expense voluntarily or deliberately made or incurred by the act of man, and absolutely or inevitably necessitated, in cases of real or imminent danger, for which contribution shall be made in proportion to the several respective interests, or by a ratable contribution by all.[22] But the sacrifice must not be by act of a stranger to the adventure whether a private person or a public official.[23] And the question of contribution cannot depend upon the amount of damage sustained by the sacrifice, for that would mean that if a man lost all his property for the common benefit, he should receive nothing, but if he lost a part only, he should receive full compensation. It is the deliverance from an immediate impending peril, by a common sacrifice, which constitutes the essence of the claim; it is the safety of the property and not of the voyage which is the foundation of general average.[24] If the adjustment is made by a professional adjuster it is not conclusive,[25] and the shipowner may make out his own

[17] Jellinghaus v. New York Ins. Co., 6 Duer (N. Y.), 1.

[18] Ursula Bright S. S. Co. v. Amsinck (U. S. D. C. S. D. N. Y.), 115 Fed. 242, 245, per Adams, Dist. J., citing The London Assurance v. Companhia de Moagens, etc., 167 U. S. 149; 17 Sup. Ct. 785; 42 L. Ed. 113; International Nav. Co. v. Atlantic Mut. Ins. Co. (D. C.), 100 Fed. 304, 317, 318.

[19] Fulton Ins. Co. v. Milner, 23 Ala. 420.

[20] Jones v. Insurance Co., 4 Dall. (U. S.) 246.

[21] See Joyce on Ins. (ed. 1897) secs. 3400–3444. See also note 20, U. S. C. C. A. 357.

[22] Joyce on Ins. (ed. 1897) sec. 3407. See Ralli v. Troop, 157 U. S. 386; 39 L. Ed. 742; 15 Sup. Ct. Rep. 657.

[23] Ralli v. Troop, 157 U. S. 386; 39 L. Ed. 742; 15 Sup. Ct. Rep. 657.

[24] Columbian Ins. Co. v. Ashby, 13 Pet. (U. S.) 331. See Ralli v. Troop, 157 U. S. 386, 394; Barnard v. Adams, 10 How. (U. S.) 270, 303.

[25] The Santa Anna Maria (U. S. D. C. D. S. C.), 49 Fed. 878.

penses of a managing owner may be allowed.[45] Again, the cargo owner is liable under a general average adjustment for the proportion of necessary and not unreasonable expenses incurred in floating a vessel stranded without negligence of the owner or unseaworthiness of the ship.[46] So where a chartered steamer, which is subchartered, is seized as prize of war, the expense of procuring her discharge paid at the owner's request by libellant by a draft on the master, is a subject of general average apportioned between ship, cargo and freight. But the owner is not liable to libellant in a suit in personam and for the amount of the draft, where the latter had neglected to proceed until the contributing interests had been separated.[47] And if the stranding is voluntary, the damage to the ship thereby caused, and all costs and consequent expenses are a subject of general average contribution.[48] There may also be a general average contribution for expenses incurred by the ship for the benefit of the adventure, although necessitated by the master's negligence which is an exception in the bill of lading.[49] And necessary towing expenses of the ship and cargo may be a basis of general average.[50] So the wages and provisions of the crew during the time required for constructing a jury rudder, and the value of the rudder lost, just before it was cut away, may be allowed.[51]

§ 1502. General average—What does not contribute or is not liable.[52]—Bullion taken from the wreck and forwarded by another vessel, for the purpose of placing it beyond injury, is not chargeable.[53] Nor does bottomry contribute, except to the

But see McAndrews v. Thatcher, 3 Wall. (U. S.) 347.

[45] Besse v. Hecht (U. S. D. C. E. D. N. Y.), 85 Fed. 677.

[46] Magdala S. S. Co. v. Baars Co. (U. S. C. C. A. N. Y.), 41 C. C. A. 377; 101 Fed. 303.

[47] Woods v. Olsen (U. S. C. C. A. La.), 39 C. C. A. 595; 99 Fed. 451.

[48] Star of Hope, 9 Wall. (U. S.) 203; Fowler v. Rathbone, 12 Wall. (U. S.) 102. But see Joyce on Ins. (ed. 1897) sec. 3423.

[49] Milburn v. Jamaica F. Imp. & T. Co., 69 L. J. Q. B. 860; [1900] 2 Q. B. 540; 83 L. T. N. S. 321; 5 Civ. Cas. 346.

[50] Sweeney v. Thompson (U. S. C. C. E. D. La.), 39 Fed. 121.

[51] May v. Keystone Y. P. Co. (U. S. D. C. E. D. Pa.), 117 Fed. 287.

[52] See Joyce on Ins. (ed. 1897) sec. 3442.

[53] New York & H. R. M. Co. v. Pacific Mail S. S. Co. (U. S. C. C. A. 2d C.), 45 U. S. App. 1; 20 C. C. A. 349; 74 Fed. 564.

owner's expenditures from their own funds, or providing for the preservation of the property.[54] Nor is damage to cargo from smoke, resulting from putting out a fire, recoverable, except voluntarily produced for the common good or safety, or caused solely by acts done therefor.[55] Nor are damages from the breaking down of a crank shaft of a steamship recoverable, where she was attempting to reach port after temporary repairs, and neither the master nor engineer intended or expected said break, and it was not a voluntary sacrifice;[56] nor is the cargo liable in such case.[57] Nor is it a case of general average where a master ships his cable, when in imminent danger of going ashore, but not for the purpose of selecting a more favorable location for stranding, and so even though the lives of the crew were thereby less imperiled.[58] Nor does the removal of the cargo merely to lighten the ship, make a case of general average, the cargo being in no danger.[59] Nor are damages to the hawsers or propeller of tugs, engaged under contract to pull off a stranded vessel and right her, included.[60]

§ 1503. Same subject continued.— Contribution cannot be claimed by the shipowner where the master is negligent, notwithstanding the Harter Act.[61] Nor are the owners entitled where there is voluntary stranding by the ship's negligence, nor can a party claim contribution where his negligence has necessitated the sacrifice.[62] Nor can a ship make a charge in general

[54] The Eliza Lines (U. S. C. C. Mass.), 61 Fed. 308.

[55] Reliance M. Ins. Co. v. New York & C. M. S. S. Co. (U. S. D. C. S. D. N. Y.), 70 Fed. 262; 45 U. S. App. 227; 23 C. C. A. 183; 77 Fed. 317.

[56] Van Den Toorn v. Leeming (U. S. D. C. S. D. N. Y.), 70 Fed. 251.

[57] Van Den Toorn v. Leeming (U. S. C. C. A. 2d C.), 45 U. S. App. 736; 79 Fed. 107.

[58] Shoe & Low Moor Iron Co. (U. S. C. C. A. 2d C.), 1 U. S. App. 39; 49 Fed. 252.

[59] Louisville Underwriters v. Pence, 14 Ky. L. R. 21; 19 S. W. 10; 21 Ins. L. J. 493.

[60] Earnmorr S. S. Co. v. New Zealand Ins. Co. (U. S. D. C. N. D. Cal.), 73 Fed. 867.

[61] Flint v. Christall, 171 U. S. 187; 18 Super. Ct. Rep. 831; 43 L. Ed. 130. But see The Irrawaddy, 171 U. S. 187, where it is declared that the court could not say that it was the intention of the Harter Act to allow the owner to share in the benefits of a general average contribution to meet losses occasioned by faults in the navigation and management of the ship. See also The Strathdon (U. S. D. C. E. D. N. Y.), 94 Fed. 206.

[62] Snow v. Perkins (U. S. D. C. S. D. N. Y.), 39 Fed. 334.

average, where there is a deviation from a safe and known course by the shipowner's instructions, causing the vessel to run upon a reef.[63] Nor can contribution be had against a steam tug for the casting off and abandonment, by her master, of her tow, with the intention and effect of saving the tug.[64] Nor is it a subject of general average where the municipal authorities of a port scuttle a ship, to extinguish a fire in her hold, without the direction of her master or other commanding officer.[65] Nor does the liability of the cargo to contribute, in favor of the ship, continue after said cargo has been completely separated from the vessel so as to leave no community of interest.[66] Nor is freight sacrificed, so as to be the subject of contribution, where the cargo must by reason of its inherent condition be totally lost by fire before termination of the chartered voyage.[67] Nor is freight pro rata itineris allowable, where at the time of the accident the ship had proceeded but a comparatively few miles of her voyage.[68] Nor is there the requisite sacrifice of freight, so as to allow contribution where, at the time of the sale, the ship and cargo were in safety, the common danger having ceased, even though the port had been sought for safety of ship, freight and cargo.[69] Nor is a general charge allowable, where the vessel is neither an actual or constructive total loss, and the cargo is sold as a matter of convenience and for prudential reasons merely and not because of an impending danger to it.[70]

§ 1504. Same subject concluded—Other sacrifices and expenses.—If the voyage is not resumed, and the expenditure not actually made, the estimated cost of reloading discharged

[63] Trindad Shipping & T. Co. v. Frame (U. S. D. C. S. D. N. Y.), 88 Fed. 528.

[64] The J. P. Donaldson, 167 U. S. 599; 42 L. Ed. 292; 17 Sup. Ct. Rep. 951; 56 Alb. L. J. 137.

[65] Ralli v. Troop, 157 U. S. 386; 39 L. Ed. 742; 15 Sup. Ct. Rep. 657.

[66] McAndrews v. Thatcher, 3 Wall. (U. S.) 347.

[67] Iredale v. China Traders Ins. Co., 68 Law J. Q. B. 1021; [1899] 2 Q. B. 356; 81 Law T. N. S. 231; 48 Wkly. Rep. 48.

[68] Earnmoor S. S. Co. v. New Zealand Ins. Co. (U. S. D. C. N. D. Cal.), 73 Fed. 867.

[69] Iredale v. Chinese Traders Ins. Co., 69 L. J. Q. B. 783; [1900] 2 Q. B. 515; 83 L. T. N. S. 299; 49 Wkly. Rep. 107; 5 Com. Cas. 337.

[70] Earnmoor S. S. Co. v. New Zealand Ins. Co. (U. S. D. C. N. D. Cal.), 73 Fed. 867. See also as to prudential reasons, New York & H. M. Co. v. Pacific Mail S. S. Co. (U. S. C. C. A. 2d C.), 45 U. S. App. 1; 20 C. C. A. 349; 74 Fed. 564.

cargo is not an item allowable.[71] So if nothing is gained by the delay, and no injury save such expense is occasioned, there can be no allowance of wages, provisions and wharfage, caused by delay in discharging cargo at the surveyor's recommendation.[72] And expenses are not allowable which are not for the preservation of ship or freight during detention in a port in a stress of weather which had caused the vessel's tanks to leak.[73] Nor can insurance be added to the value of what is saved.[74] Nor can expenses at a port of refuge be charged against a cargo, occasioned by leaks caused by stranding and due, not to perils of the seas, but by unseaworthiness at the commencement of the voyage.[75] Nor can the expenses of a port of refuge be allowed where the ship sailed with a short supply of coal, even though her bill of lading permits calling at any port or ports for whatever purpose.[76]

§ 1505. Marine insurance—Aggregation of losses.—Loss occasioned by necessary jettison may be aggregated with salvage expenses to equal the specified rate per cent, under a stipulation "free from average" unless the loss amounts to ten per cent.[77] But particular and general average losses cannot be aggregated, nor are general average charges included in partial loss.[78] And, in cases of excepted risks and losses with relation to a specified percentage, the question of aggregation of losses or the addition of successive losses is material and one which has been the subject of much discussion.[79]

§ 1506. Marine insurance—Concurrent causes of loss—Discrimination—Apportionment—Predominating liability—Loss by fire.—When two causes of loss concur, one at insured's

[71] The Eliza Lines (U. S. C. C. Mass.), 102 Fed. 184.

[72] Besse v. Hecht (U. S. D. C. E. D. N. Y.), 85 Fed. 677.

[73] The Brigella [1893], P. 189.

[74] The Rapid Transit (U. S. D. C. D. Wash.), 52 Fed. 320.

[75] The Manna Loa (U. S. D. C. S. D. N. Y.), 76 Fed. 829.

[76] Hurlbut v. Turnure (U. S. C. A. 2d C.), 51 U. S. App. 280; 81 Fed. 208.

[77] Gazzam v. Cincinnati Ins. Co., 6 Allen (Mass.), 71; Joyce on Ins. (ed. 1897) sec. 2715. See id. secs. 2716, 2717.

[78] Billora v. Western M. & F. Ins. Co., 1 La. Ann. 57; Reynolds v. Ocean Ins. Co., 22 Pick. (Mass.) 191; 33 Am. Dec. 727; Joyce on Ins. (ed. 1897) sec. 2714.

[79] Joyce on Ins. (ed. 1897) secs. 2703, 2711, 2712.

risk and the other insured against, or one insured against by A and the other by B, if the damage caused by such peril can be discriminated, it must be borne proportionably. If, however, the damage caused by each peril cannot be distinguished from that caused by the other, the party responsible for the predominating efficient cause, or that which set in operation the other incidentally to it, is liable for the loss, and this applies to a cause of loss of a vessel insured against loss by fire.[80]

§ 1507. Technical particular average loss.—The rule for computing a technical particular average loss under the English decisions is that the damaged goods, upon reaching their destination, must be at once sold for the best price that can be had. It is then to be determined what the goods would have been worth in the same market had they been sound, and the difference between the sound value and the proceeds of the sale of the damaged articles, gives the ratio of determination, and the underwriter is to pay this ratio or percentage of loss on the policy value.[81]

§ 1508. Marine insurance—One third new for old.—The rule one third new for old, in cases of partial loss or particular average in marine insurance, is established by general usage founded on public convenience. The result is to prevent such controversies as would necessarily arise by actual inspection and estimate, in each particular case, in ascertaining comparative values. It is assumed that the substitution of new materials for old, in case of wooden vessels, makes the ship better than before the necessity for repairs arose, and therefore one third the expense and labor and material is laid upon assured as his burden, to equalize the benefits, the remaining two thirds of such expense being borne by the insurers. The effect of this rule is

[80] Insurance Co. v. Transportation Co., 12 Wall. (U. S.) 194. See Patapsco Ins. Co. v. Coulter, 3 Pet. (U. S.) 222. As to English rule, see Joyce on Ins. (ed. 1897) and index therein, "Proximate and remote cause."

[81] London Assurance v. Companhia De Moagens, etc., 167 U. S. 149; 17 Sup. Ct. Rep. 785, 793, per Peckham, J., citing Lewis v. Rucker, 2 Burr. 1167; Johnson v. Sheddon, 2 East. 581; 2 Marsh. on Ins. (2d ed.) 623; Lown Ins. sec. 269; McArthur on Ins. 207.

to qualify the principle of indemnity, since the insured is seldom benefited to the extent of one third, and the underwriter is benefited. This usage applies to river and steamboat navigation, but is not applicable to iron ships, although one third is to be deducted in certain cases of iron and steel or composite ships.[82] The rule, however, of one third new for old, as in case of a partial loss, is inapplicable to cases of a technical total loss by an injury exceeding one half the value of the vessel.[83]

§ 1509. Marine insurance — Ship — Recovery and damages—Collision—Expenses—Value.[84]—If an insured vessel is injured in collision by another ship, the damages occasioned thereby are not covered by a policy which contains no stipulation therefor.[85] And where the policy stipulates for the payment of a certain proportion of any sum paid by the assured, in consequence of a collision, by way of damages to any other person, but not including liability or payments for removal of obstructions under statutory powers, a removal upon the requirement of the authorities of a foreign country, of a vessel, sunk by collision, does not render the underwriters liable for the cost thereof, paid by the owners of the insured vessel to the owners of the vessel sunk by the former.[86] But where it is stipulated in the policy that insured shall be fully indemnified for any loss or damage occasioned by accident, caused by collision, for which the owner of a tug may be legally liable, the insurance being against losses incurred while towing vessels, and the liability of assured is required to be established by suit as a condition precedent to recovery, the expenses of defending such an action are recoverable.[87] So assured may re-

[82] Joyce on Ins. (ed. 1879) secs. 3078, 3079. See also id., secs. 3077–3082, 3084–3087, 3090, 3095, 3103, 3104, 3429, for discussion and application of the rule.

[83] Bradlie v. Maryland Ins. Co., 12 Pet. (U. S.) 378.

[84] See Joyce on Ins. (ed. 1897) and index therein, "Ship;" "Adjustment," etc.; "Deductions;" "Expenses;" "Collision"; "Valuation," etc.

[85] Goucher v. Providence-Washington Ins. Co., 3 Super. Ct. (Pa.) 230; 40 W. N. C. 112.

[86] The North Britain (C. A.), [1894] P. 77; Tatham v. Burr (H. L. E.), [1898] A. C. 382; 78 Law T. Rep. 473; 67 L. J. P. D. & A. N. S. 61.

[87] Egbert v. St. Paul F. & M. Ins. Co. (U. S. D. C. S. D. N. Y.), 92 Fed. 517. See Xenos v. Fox, L. R. 3 C. P. 630.

pany, and issued to the same person at the same time, and loss arises under each policy, except that the amount is greater than the sums mentioned in either policy, but less than the aggregate of both policies, the assured, if entitled to a verdict, is entitled to recover the full amount of his actual loss.[4] Again, a shipowner is liable for loss under insurance procured by him, the expense of which is covered by a through rate for the transportation of goods by vessel and by rail, where on previous occasions he has received the insurance from the underwriters and settled with the owner, on the ground that he acted only as the agent of the owner of the cargo.[5] If the policy is upon personal effects, deduction must be made from the amount of the policy of the value of the articles saved, even though the loss is greater than the policy amount.[6]

§ 1512. Same subject continued.—In case of a total loss the insurer loses precisely as much as the property insured was worth at the time and place of shipping it, the expense of lading included. What the property cost the assured is not the rule of value in adjusting the loss, but what it was worth or would sell for when shipped;[7] or the value of the property, at the time and place of shipping it, with the expense of lading, is the amount recoverable in case of total loss, and its worth is what it would sell for when shipped, and the cost of the property cannot be the rule of value in adjusting the loss.[8] And if the owner, or consignee, of the goods takes out an insurance, there can be a recovery in case of a total loss, of the agreed value in the policy.[9] But in an open policy on cargo, the invoice price of the goods is the value which, upon a total loss, the insured is entitled to recover.[10] And goods are to be esti-

[4] Phœnix, etc., Ins. Co. v. Cochran, 51 Pa. St. 143; Joyce on Ins. (ed. 1897) sec. 3454.

[5] Hill v. Scott (C. A.), [1895] 2 Q. B. 713; 65 L. J. Q. B. N. S. 87, aff'g [1895] 2 Q. B. 371; 73 Law T. Rep. 210; 64 L. J. Q. B. N. S. 635.

[6] Canton Ins. Co. v. Woodside (U. S. C. C. A. 9th C.), 61 U. S. App. 214; 33 C. C. A. 63; 90 Fed. 301; 28 Ins. L. J. 269.

[7] Carson v. Marine Ins. Co., 2 Wash. (U. S. C. C.) 468; Joyce on Ins. (ed. 1897) sec. 3454.

[8] Carson v. Marine Ins. Co., 2 Wash. (U. S. C. C.) 468; Fed. Cas. No. 2465.

[9] Ursula Bright S. S. Co. v. Amsinck (U. S. D. C. S. D. N. Y.), 115 Fed. 242, 245.

[10] Gahn v. Broome, 1 Johns. (N. Y.) 120.

mated at prime cost and charges, without deducting the drawback, in estimating loss on an open policy on cargo.[11] Again, in the settlement of policies, in which a rate of exchange is fixed at which the prime cost of the cargo shall be valued, the whole cargo is to be valued at that rate, even though the rate of ascertaining values is fixed differently under other policies.[12] But the rule of damages, that the market value of goods with costs and charges of a certain kind at the commencement of the risk, governs, may be varied by the usage of a particular part.[13] The value, however, of the goods at the place of disaster measures the damages, under an open policy on goods in transit.[14] And increased value at the port of discharge is not to be considered,[15] but the value of goods shipped at a foreign port is their invoice price there.[16] And if a cargo is invoiced from a foreign country, in currency there, the actual value there of that currency when the cargo was shipped determines the amount to be paid for loss of such cargo.[17]

§ 1513. Marine insurance—Collision—Recovery by underwriters—Cargo.—The underwriters of the cargo of a vessel may recover the full amount of their damages, where the vessel has been sunk by collision by the mutual fault of both colliding vessels.[18]

§ 1514. Interest in goods on deck—Valued policy—Liquidated damages—Total loss—Deduction by settlement, etc.—Where the insurance is not upon the goods, but upon the liability of the shipowner incident to the shipment of the goods on deck, and the insured had no interest in goods apart from its liability due to the method of carriage, and the under-

[11] Minturn v. Columbian Ins. Co., 10 Johns. (N. Y.) 75.

[12] Pleasants v. Maryland Ins. Co., 8 Cranch (U. S.), 55; 3 L. Ed. 486.

[13] Warren v. Franklin Ins. Co., 104 Mass. 518.

[14] Savage v. Com. Exch. F. & I. Ins. Co., 36 N. Y. 655.

[15] Wells v. Gray, 10 Mass. 42.

[16] Coffin v. Newburyport M. Ins. Co., 9 Mass. 436.

[17] Phillips v. Ins. Co. of Pa., Fed. Cas. No. 11,102.

[18] The New York, 175 U. S. 187; 20 Sup. Ct. Rep. 67. But see Union Steamboat Co. v. Erie & W. Trans. Co., 27 C. C. A. 154; 82 Fed. 819; 30 C. C. A. 628; 86 Fed. 814; The Victory and The Plymothian, 168 U. S. 410; 42 L. Ed. 519; 18 Sup. Ct. Rep. 149.

writers could acquire no interest in the goods by subrogation, and the object of the insurance being indemnity against loss to the extent of the value of the interest of the assured, the agreement with respect to the value is conclusive in case of total loss, as to the amount at risk, and stands by way of liquidated damages in lieu of any proof as to the value of the interest; and the insurers are not entitled to any deduction, by reason of the settlement by the shipowners of their liability for loss, than the value of the goods, nor because the whole amount at risk was not insured.[19]

§ 1515. Marine insurance—Memorandum articles—Salvage—Total loss.—The terms of the stipulation may be such, that the loss is to be ascertained in accordance with the principles of salvage loss with benefit of salvage to the insurers, and that the settlement will include the adjustment and payment of the amount; the contract may also limit the recovery to fifty per cent of the sound value of the whole shipment, at the port of delivery; so that under such stipulations and contract, if the loss exceeds fifty per cent of the sound value of the whole shipment at the port of delivery, the underwriters will be liable, and the loss sustained by the necessary sale of part of the cargo at a port of refuge constitutes a total loss as to said part.[20] But insurers are not liable on memorandum articles, except in case of actual total loss, and there can be no actual total loss where a cargo of such articles has arrived, in whole or in part, in specie, at the port of destination, but only when it is physically destroyed, or its value extinguished by a loss of identity. And the rider "free of particular average but liable for absolute total loss of a part, if amounting to five per cent," renders the insurers liable for an actual total loss of a part.[21] There cannot, however, be a technical total loss of part of a cargo, consisting of memorandum articles, of one

[19] Ursula Bright S. S. Co. v. Amsinck (U. S. D. C. S. D. N. Y.), 115 Fed. 242, citing Watson v. Insurance Co., Fed. Cas. No. 17,286.

[20] La Foncière Compagnie D'Assurances, etc., v. Koons (U. S. C. C. A.), 75 Fed. 110; 71 Fed. 978; Joyce on Ins. (ed. 1897) sec. 3451. See also id. secs. 2818, 2938–2941, 3067.

[21] Washburn & M. Mfg. Co. v. Reliance M. Ins. Co., 179 U. S. 1; 21 Sup. Ct. R. 1, 3, per Fuller, Ch. J., aff'g, 50 U. S. App. 231; 27 C. C. A. 134; 82 Fed. 296.

species, such as hides; nor are the underwriters liable for salvage upon such articles, under the sue and labor clause, unless perhaps in a case where the salvage may have prevented an actual total loss of the cargo.[22]

§ 1516. Marine insurance—Salvage—Policy valuation—Expenditures.—Where a cargo of damaged wheat being practically unsalable at the port of destination is sold at a port of refuge, the voyage being broken up, for the benefit of all concerned, the difference between the proceeds and the valuation in the policy is the amount for which the insurer is liable as upon a salvage loss.[23] And all salvage losses and expenditures are covered by a valued policy on the ship, she being damaged by stranding and necessary salvage operations.[24]

§ 1517. Marine insurance — Freight—Profits—Recovery and damages—Deductions—Total loss.[25]—The insurers are not liable for freight under a policy on cargo;[26] nor can there be a recovery by the owners of "lump chartered freight," where sufficient of the cargo arrives to have enabled them to satisfy their entire freight charge, by enforcing their lien under the terms of the charter party.[27] In insurance on freight the policy valuation is prima facie evidence,[28] and insurers may become liable for freight pro rata itineris by acceptance of goods at an intermediate port.[29] If cargo might have been carried on, but is sold at a port of distress, there is no total loss of freight,[30] although the freight of a vessel totally lost, by being run on

[22] Brays v. Chesapeake Ins. Co., 7 Cranch (U. S.), 415. See Insurance Co. v. Fogarty, 19 Wall. (U. S.) 640, 643; Morean v. United States Ins. Co., 1 Wash. (U. S.) 219.

[23] London Assurance v. Companhia De Moagens, etc., 167 U. S. 149; 17 Sup. Ct. Rep. 785, aff'g 15 C. C. A. 379; 68 Fed. 247.

[24] International Nav. Co. v. British & Foreign M. I. Co. (U. S. C. C. A. N. Y.), 48 C. C. A. 181; 108 Fed. 987; aff'g International Nav. Co. v. Thames & Mersey Ins. Co. (U. S. D. 1900), 100 Fed. 304.

[25] See Joyce on Ins. (ed. 1897) and index therein, "Adjustment;" "Deductions," etc.; "Freight;" "Profits;" "Total loss;" "Valuation," etc.

[26] Caze v. Baltimore Ins. Co., 7 Cranch (U. S.), 358.

[27] Brankeman S. S. Co. v. Canton Ins. Co. [1899], 2 Q. B. 178; 68 L. J. Q. B. N. S. 811.

[28] Mutual Safety Ins. Co. v. Cargo of Brig George, Fed. Cas. No. 9981.

[29] The Mohawk, 8 Wall. (U. S.) 153.

[30] Hugg v. Augusta Ins. Co., 7 How. (U. S.) 595.

shore for her preservation, and that of the crew and cargo, ought to be allowed to the owner of the vessel, as a subject of general average, the cargo having been saved by the stranding.[31] So in case of a total loss on freight, the insured may recover the whole amount of the freight, without deductions for expenses which would have been incurred in case of safe arrival.[32]

§ 1518. Same subject continued.—Under an open policy on freight, the gross amount, on a total loss, is the amount to be recovered without being subject to a deduction for expenses of wages and provisions.[33] And the full amount of the profits, as valued, in a policy against total loss only, may be recovered with interest and costs, although the cargo was abandoned as for a total loss, and came into the hands of the libellant through a settlement by the insurer as for a total loss, and was received by the former upon an equitable basis in part payment and as the equivalent of the value in cash.[34] So where there was insurance upon the freight of a vessel, on a voyage from C. to R., thence to a port of discharge in the United States, the insurance was upon the freight of each successive voyage, and is to be applied to the freight at risk at any time, whether on the outward or homeward voyage, to the amount of the valuation. Therefore, when the vessel performed the outward voyage and was condemned as unseaworthy, and the whole freight of the return voyage lost, the underwriters are not entitled to a deduction of the freight earned on the outward voyage.[35] Again, it is declared that it is difficult to perceive why, if profit be a mere excrescence of the principal, as some judges have said, or identified with it, as said by others, the loss of the cargo should not carry with it the loss of the profits; and proof that profits would have arisen on the voyage, in order to recover on a policy on profits, is not required if the cargo has been lost.[36]

[31] Columbian Ins. Co. v. Ashby, 13 Pet. (U. S.) 331.

[32] Stevens v. Columbian Ins Co., 3 Caines (N. Y.), 43; 2 Am. Dec. 247.

[33] Stevens v. Columbian Ins. Co., 3 Caines (N. Y.), 43; 2 Am. Dec. 247; Joyce on Ins. (ed. 1897) sec. 3454.

[34] Canada Sugar Ref. Co. v. Ins. Co. of N. Amer., 175 U. S. 609; 20 Sup. Ct. Rep. 238, rev'g Insurance Co. of N. Amer. v. Canada Sugar Ref. Co., 58 U. S. App. 22; 31 C. C. A. 65; 87 Fed. 491; 27 Ins. L. J. 959, which rev'd 82 Fed. 757.

[35] Insurance Co. of Va. v. Mordecai, 22 How. (U. S.) 111.

[36] Patapsco Ins. Co. v. Coulter, 3

§ 1519. Marine insurance—Ship, cargo and freight—Damages.—If the ship, cargo and freight belong to the same person, and the freight and cargo are not insured, the insured on the vessel can only recover the proportion chargeable to the vessel.[37] And the place of the commencement of the risk determines the value of the vessel and goods.[38]

§ 1520. Fire risk—Buildings—Deterioration—Total loss—"Wholly destroyed"—"Totally destroyed."—The value of the buildings as they stood upon the land immediately prior to the fire is the measure of damages, or the value at the time of the loss;[39] and if such value is fixed in the policy, it governs as the measure of damages,[40] otherwise, in case of total loss, such elements may be considered as the original cost, the cost of a like building on the same land at the time of trial, its age and use, and the difference in value between the destroyed property and a new building, or in other words, deterioration is a factor.[41] So the damages are not limited to the amount for which the building could have been sold. The true measure of damages is indemnity to the assured not exceeding the sum insured; neither is the cost of replacement the only criterion.[42] Again, the statute may require payment of the full amount of the loss, not in excess of the policy amount, and such provision does not exclude a provision as to the mode of estimation or adjustment of the loss,[43] or the statute may prohibit the insurer from denying that the property was worth the full amount of the policy.[44]

Pet. (U. S.) 222. See Canada Sugar Ref. Co. v. Ins. Co. of North Amer., 175 U. S. 609, 624, where recovery on profits was allowed as valued in the policy.

[37] Jumel v. Marine Ins. Co., 7 Johns. (N. Y.) 412; Joyce on Ins. (ed. 1897) sec. 3454.

[38] Wolf v. Nat. Mar. & F. Ins. Co., 20 La. Ann. 583; Clark v. United F. & M. Ins. Co., 7 Mass. 365; 5 Am. Dec. 50.

[39] Hilton v. Phœnix Assur. Co., 92 Me. 272; 42 Atl. 412; State Ins. Co. v. Taylor, 14 Colo. 499; 24 Pac. 333; 20 Am. St. Rep. 281.

[40] Continental Ins. Co. v. Moore, 23 Ky. L. Rep. 72; 62 S. W. 517; Lancashire Ins. Co. v. Bush (Neb. 1900), 82 N. W. 313; Comp. Stat. 1890, ch. 43, sec. 43.

[41] State Ins. Co. v. Taylor, 14 Colo. 499; 24 Pac. 333; 20 Am. St. Rep. 281; Joyce on Ins. (ed. 1897) sec. 3455.

[42] State Ins. Co. v. Taylor, 14 Colo. 499; 20 Am. St. Rep. 281; 24 Pac. 333; Joyce on Ins. (ed. 1897) sec. 3454.

[43] Burkett v. Georgia Home Ins. Co., 105 Tenn. 548; 58 S. W. 848.

[44] Marshall v. American Guarantee

struction so necessitated.[55] And where it is so stipulated, the measure of damages is the sum it would cost insured to repair or replace the building destroyed with material of like kind and quality.[56] Again, if there is an election to rebuild or repair, and there is unreasonable delay in so doing, or in prosecuting the work, damages are recoverable as for the loss under the contract, or for resulting damage.[57] And where repairs are made, even though they are of substantial benefit, yet if they do not make fully good the loss, the measure of damages is the difference between the value of the building as repaired, and what it would have been worth if fully repaired, less such proportion as the assured has agreed to contribute towards the expense.[58] If the insurer, having elected to repair fails to do so, and assured completes the building, the cost thereof measures the assurer's liability without reference to the amount of the insurance.[59]

§ 1523. Fire risk—Cost of producing the property.—If the policy provides that the measure of damages shall not exceed the actual cost of producing the property destroyed, evidence as to the market or cash value thereof furnishes no standard for estimating the damages.[60] The market value, however, of the insured machinery is not the measure of damages, where there is a limitation by stipulation of liability beyond the actual cash value of the property at the time of the loss, not exceeding the cost of repairing or replacing the same.[61]

§ 1524. Fire risk—Personal property, goods, etc.—The

[55] Pennsylvania Co., etc., v. Philadelphia Contributionship, etc. (Pa. 1900), 7 Lack. L. N. 87; 10 Pa. Dist. R. 181. See Larkin v. Glens Falls Ins. Co. (Minn. 1900), 83 N. W. 409, as to repairs, etc., prohibited by ordinance.

[56] McCready v. Hartford F. Ins. Co., 61 App. Div. 583; 70 N. Y. Supp. 778. See Larkin v. Glens Falls Ins. Co. (Minn. 1900), 83 N. W. 409.

[57] Home Ins. Co. v. Thompson, 1 N. C. 247; Joyce on Ins. (ed. 1897) sec. 3150, 3163.

[58] Parker v. Eagle Ins. Co., 9 Gray (Mass.), 152. See Joyce on Ins. (ed. 1897) secs. 3150, 3163, for a full discussion of these questions.

[59] Henderson v. Crescent Ins. Co., 48 La. Ann. 1176; 20 So. 658; 35 L. R. A. 385. See Langan v. Ætna Ins. Co., 99 Fed. 374; Ætna Ins. Co. v. Langan (U. S. C. C. A. Iowa), 48 C. C. A. 174; 108 Fed. 985.

[60] Chippewa Lumber Co. v. Phœnix Ins. Co. (Mich.), 44 N. W. 1055; Joyce on Ins. (ed. 1897) sec. 3454.

[61] Standard Sew. Mach. Co. v. Royal Ins. Co., 201 Pa. 645; 51 Atl. 354.

measure of recovery for loss of goods, insured against fire, is the market or cash value at the time and place of the fire.[62] And even though, under a statute, a policy on personal property is converted into a valued policy, yet no more than the damages sustained can be recovered, except in case of a total loss, in view of the proviso in the statute, precluding a recovery of more than the damages sustained where there is a partial loss.[63] Again, the valuation of goods must be made upon the basis of their real value, that is their selling value at the time and place of loss and not necessarily the cost price,[64] although plaintiff may testify that he tried to sell the damaged goods after the fire and what per cent of the cost price he could realize, since the facts as to depreciation or other relevant matter are the proper subject of cross-examination.[65] But where royalties were insured against fire on the premises of the licensee, a proper basis of estimation of the loss is arrived at by the amount of royalties paid for two months immediately preceding the fire, during the time the works were being restored and for some months thereafter.[66]

§ 1525. Fire risk—Concurrent insurance—Proportionate amount stipulated—No deduction of amount in settlement—Other insurers.— In concurrent insurance the insurer is bound only for the proportionate amount of the loss as stipulated, and it is competent for either insurer to settle with insured on any terms upon which they can mutually agree, and the amount paid in such settlement should not be deducted from the amount of the verdict against the other insurer.[67]

§ 1526. Failure to save or protect property—Putting out

[62] Grubbs v. North Carolina Home Ins. Co., 108 N. C. 472; 23 Am. St. Rep. 62; 20 Ins. L. J. 784; Joyce on Ins. (ed. 1897) sec. 3454.

[63] Stemmer v. Scottish Un. & N. Ins. Co., 33 Or. 65; 53 Pac. 498; 27 Ins. L. J. 972.

[64] Liverpool L. & G. Ins. Co. v. Valentine (Can.), Rap. Ind. Quebec, 7 B. R. 400.

[65] Read v. State Ins. Co., 103 Iowa, 307; 72 N. W. 665.

[66] National Filtering Oil Co. v. Citizens' Ins. Co., 106 N. Y. 535; 13 N. E. 337; Joyce on Ins. (ed. 1897) sec. 3454.

[67] Goodwin v. Merchants & B. M. Ins. Co. (Iowa, 1902), 92 N. W. 894. See as to concurrent insurance, Joyce on Ins. (ed. 1897) and index therein, "Concurrent insurance;" "Other or double and overinsurance."

fire—Separation of damaged, etc., goods.—If the insured is required, by stipulation in the policy, to use his best endeavor to save and protect the property from damage, at and after the fire, he must do so or he cannot recover.[68] This distinction, however, seems to exist that when the provision is that every policy holder in case of a fire is bound to do all that he reasonably can to preserve and protect the property insured, the insured cannot hold the company liable for loss directly traceable to a disregard of that duty; yet where there is nothing which makes the neglect of the assured an avoidance of the policy, the stipulation is sufficiently enforced by directing the jury to disallow for the loss of anything which was occasioned thereby.[69] Again, actual malfeasance in preventing others from putting out fire precludes a recovery, and the failure to extinguish a fire in its incipiency may be culpable negligence.[70] And failure to separate damaged and undamaged goods as stipulated in a policy precludes recovery, unless such condition precedent is waived or excused.[71]

§ 1527. Fire risk—Salvage goods carried with new stock—Proportionate expense of sale.—Where salvage goods are carried with the new stock, the assured having resumed business after the fire and sold as opportunity offered, the question as to the proper proportion of the expense of the salvage goods is properly submitted to the jury to be determined in view of all the facts surrounding its sale.[72]

§ 1528. Fire risk—Trustee under deed—Agreement as to amount of loss not binding.—The trustee of a fire policy, under a deed to secure an indebtedness, is not bound by an agree-

[68] Sisk v. Citizens Ins. Co., 16 Ind. App. 565; 45 N. E. 804; 26 Ins. L. J. 369.

[69] Walters v. Western Assurance Co., 95 Wis. 265; 70 N. W. 62; 26 Ins. L. J. 877; approved but dist'd in Thornton v. Security Ins. Co. (U. S. C. C. M. D. Pa.), 117 Fed. 773.

[70] Phœnix Ins. Co. v. Mills, 77 Ill. App. 546.

[71] Thornton v. Security Ins. Co. (U. S. C. C. M. D. Pa.), 117 Fed. 773, citing Oshkosh Match Works v. Manchester F. Assur. Co., 92 Wis. 510; 66 N. W. 525. See 28 Cent. Dig. secs. 1291, 1292.

[72] Palatine Ins. Co. v. Morton-Scott-Robertson Co. (Tenn. 1901), 30 Ins. L. J. 481, 495, 496, per McAlister, J.

ment as to the amount of the loss made between the owner and the insurer.[73]

§ 1529. Mortgagor and mortgagee.—Whether the mortgagor or the mortgagee is entitled to recover and the amount of recovery in either case depends upon (1) the nature of the interest insured; (2) agreements between said parties as to the procurement of insurance; (3) who pays or is obligated to pay the premium; (4) the doctrine of subrogation; (5) the terms of the insurance contract, as to whom payable, etc., and other factors.[74] It has been decided that when insurance is made by the mortgagor he will, notwithstanding the mortgage or other incumbrance, be entitled to recover the full amount of his loss, not exceeding the insurance, since the whole loss is his own. The mortgagee can only insure to the amount of his debt, whereas the mortgagor can insure to the full value of his property, notwithstanding any incumbrance thereon.[75] But it is also

[73] Colburn v. Dortic (Colo. 1902), 70 Pac. 149.

[74] Joyce on Ins. (ed. 1897) and index therein, "Mortgagee;" "Mortgagor;" "Subrogation." See as to mortgage, mortgagor, mortgagee clause, etc., recovery, etc., Holbrook v. Balvise F. Ins. Co., 117 Cal. 561; 49 Pac. 555; Scania Ins. Co. v. Johnson, 22 Colo. 476; 45 Pac. 431; Christensen v. Fidelity Ins. Co. (Iowa), 90 N. W. 495; Lancashire Ins. Co. v. Boardman, 58 Kan. 339; 49 Pac. 92; Home Ins. Co. v. Koob (Ky. 1902), 68 S. W. 453; Sun Ins. Office v. Varble, 103 Ky. 758; 46 S. W. 486; 41 L. R. A. 792; Agricultural Ins. Co. v. Hamilton, 82 Md. 88; 33 Atl. 429; 30 L. R. A. 633; Hardy v. Lancashire Ins. Co., 166 Mass. 210; 44 N. E. 209; 33 L. R. A. 241; Palmer Sav. Bk. v. Insurance Co. of N. Amer., 166 Mass. 189; 44 N. E. 211; 32 L. R. A. 615; Wilcox v. Mutual F. Ins. Co. of M., 81 Minn. 478; 84 N. W. 334; Lowry v. Insurance Co. of N. Amer., 75 Miss. 43; 21 So. 664; 37 L. R. A. 779; Georgia Home Ins. Co. v. Stein, 72 Miss. 943; 18 So. 414; Oakland Home F. Ins. Co. v. Bank of Commerce, 47 Neb. 717; 66 N. W. 646; 36 L. R. A. 673; Phœnix Ins. Co. v. Trust Co., 41 Neb. 834; 60 N. W. 133; 25 L. R. A. 679 and note; Eddy v. Fire Assoc. of Phila., 143 N. Y. 311; 62 N. Y. St. R. 316; 38 N. E. 307; 25 L. R. A. 686, aff'g 65 Hun, 307; 48 N. Y. St. R. 10; 20 N. Y. Supp. 216; Imperial Ins. Co. v. Wolf, 21 Ohio Cir. Ct. R. 202; 11 O. C. D. 815; Hocking v. Virginia F. & M. Ins. Co., 99 Tenn. 729; 42 S. W. 451; 39 L. R. A. 148; Sun Ins. Co. v. Beneke (Tex. Civ. App. 1899), 53 S. W. 98; Peck v. Girard F. & M. Ins. Co., 16 Utah, 421; 51 Pac. 255; Burrows v. McCalley, 17 Wash. 269; 49 Pac. 508; Insurance Co. v. Bohn, 27 U. S. App. 564; 12 C. C. A. 531; 65 Fed. 165; 27 L. R. A. 614; Stanstead & S. M. F. Ins. Co. v. Gooley (Can.), 9 Rap. Jud. Queb. B. R. 324.

[75] Carpenter v. Providence W. Ins. Co., 18 Pet. (U. S.) 495.

determined that the mortgagee, in case of a total loss, is entitled to recover the full amount insured, provided it does not exceed that which at the time of the loss was due upon the mortgage.[76] And where a policy is taken out by the mortgagor, and another by the mortgagee for his own benefit, without the mortgagor's consent, there can be no apportionment of the loss under the two policies.[77] Nor is recovery of the full amount, under a fire policy payable to the mortgagee, precluded by the fact that contrary to the policy stipulations the mortgagor had, without the insurer's consent, made a second mortgage on the property to a party who, without consent of the company, had procured insurance thereon in another company.[78]

§ 1530. Subrogation — Extent of indemnity — Settlement.[79]—Subrogation is an incident to the doctrine of indemnity.[80] And, upon payment of the loss to the mortgagee, the insurer may, under stipulation, become subrogated to his rights to the extent of enforcing the same in a foreclosure suit.[81] So where the loss sustained by destruction of a party wall has been paid in full, the insurer may, by the right of subrogation, recover one half the amount of such loss, so paid, from one who uses said party wall, which has been rebuilt by the adjoining owner.[82] And subrogation to the rights of a carrier, as against other insurance companies, may exist.[83] Again, an insurer against loss by fire, subrogated for the assured by reason of the payment of the policy, may, in a suit against a common carrier, brought in assured's name for the value of the goods insured, recover the full amount of the loss or damage without regard to the amount in the policy.[84] So an insurance agent

[76] Kernochan v. New York F. F. Ins. Co., 5 Duer (N. Y.), 1.

[77] Cannon v. Home Ins. Co., 49 La. Ann. 1367; 22 So. 387; 26 Ins. L. J. 737.

[78] City Five Cent Sav. Bk. v. Pennsylvania F. Ins. Co., 122 Mass. 165; Joyce on Ins. (ed. 1897) sec. 3454.

[79] See Joyce on Ins. (ed. 1897) secs. 3537–3583, and also index therein, "Subrogation." See also 28 Cent. Dig. cols. 2447 et seq., secs. 1504 et seq.

[80] Joyce on Ins. (ed. 1897) sec. 28.

[81] Insurance Co. of N. A. v. Martin, 151 Ind. 209; 1 Repr. 62; 51 N. E. 361.

[82] Monteleone v. Harding, 50 La. Ann. 1147; 23 So. 990.

[83] Home Ins. Co. v. Minneapolis St. P. & S. S. M. R. Co., 71 Minn. 296; 74 N. W. 140.

[84] Mobile & M. R. Co. v. Jurey, 111 U. S. 584. See St. Louis, I. M. & S. R. Co. v. Commercial Ins. Co., 139 U. S. 223, 235; Chicago, St. L. & N.

may be subrogated to the rights of the insurers, to recover the amount of premiums, in an action against holders of notes secured by trust deeds.[85]

§ 1531. Same subject continued.— The insurer may be subrogated to assured's rights against one whose negligence has caused the loss, in the amount paid insured.[86] And where the underwriter on cargo has paid the loss, and intervenes in a suit to recover damages for the collision, the vessel and cargo having been sunk, he is subrogated only to assured rights, and is restricted to the same extent as the latter in respect to contributory fault and consequent limitation, or division of damages.[87] But it is also decided that the company is ordinarily entitled to recover the entire loss of assured against such negligent person.[88] Again, recovery from a third person whose negligence caused the loss precludes recovery.[89] So a release,[90] or a settlement with a tort feasor, which destroys the right of subrogation, defeats a recovery on the policy,[91] although insured, who has been paid his loss, is justified in settling with a third person whose negligence caused the fire, even though the settlement is for less than the sum paid by the insurers, and so, notwithstanding one of the insurers did not concur with the other insurers in said adjustment and was not notified thereof.[92] An insurer is not, however, entitled to subrogation against the vendee of assured goods on the ground of fraudulent representations as to their value.[93]

O. R. R. Co. v. Pullman Southern Car Co., 139 U. S. 79, 87; Phœnix Ins. Co. v. Erie Trans. Co., 117 U. S. 312, 321; and examine Southern Bell Telep. & Teleg. Co. v. Watts, 66 Fed. 464. See Joyce on Ins. (ed. 1897) secs. 3537-3583.

[85] Boston Safe Deposit & T. Co. v. Thomas, 59 Kan. 470; 53 Pac. 472.

[86] Atchison, T. & S. F. R. Co. v. Neet, 7 Kan. App. 495; 54 Pac. 134. See Atchison, T. & S. F. R. Co. v. Home Ins. Co., 59 Kan. 432; 53 Pac. 459; 27 Ins. L. J. 790.

[87] The Livingstone (U. S. D. C. N. Y.), 104 Fed. 918.

Stoughton v. Manufacturers Nat. Gas Co., 165 Pa. 428; 35 W. N. C. 519; 25 Pitts. L. J. N. S. 433; 30 Atl. 1001.

[89] Kennedy v. Iowa State Ins. Co. (Iowa), 91 N. W. 831.

[90] Sims v. Mutual F. Ins. Co., 101 Wis. 586; 77 N. W. 908.

[91] Packham v. German F. Ins. Co., 91 Md. 515; 46 Atl. 1066.

[92] Svea Assur. Co. of G. v. Packham (Md. 1901), 48 Atl. 359; 52 L. R. A. 95.

[93] Farmers F. Ins. Co. v. Johnston, 113 Mich. 426; 4 Det. L. N. 352; 71 N. W. 1074; 27 Ins. L. J. 217.

ages by an employee does not render it liable for the full amount of the judgment recovered against the employer, where the limitation of liability is for a specified sum less than said judgment, and this is so even though insured could have settled for much less than the amount of insurance, the stipulation in the policy providing that any settlement by assured was at his own cost.[4]

§ 1539. Elevator insurance—Profits—Deductions of pool earnings.—If the insurance on an elevator, for use and occupancy, is fixed at a specified sum per working day during disability, the question of profits is immaterial in case of a loss, and such contract, not being one of indemnity, does not permit the defendant to avail itself of a share received by the plaintiff from a pool of the earnings of other elevators, under a contract made with other elevator owners therefor.[5]

§ 1540. Insurance of live stock.[6]—The full amount of insurance upon a horse cannot be recovered, where the policy stipulates against insurance of any animal for more than half its cash value, and the amount of insurance was the sum paid for the horse, although there was evidence showing that it was worth twice that amount.[7] Again, if stock is injured by a tornado, under a policy covering such loss, the measure of damages is the depreciation in value of the stock with relation to their value immediately before and immediately after the injury. What they sold for a considerable period of time thereafter is not the test.[8]

§ 1541. Credit insurance—Insolvency, etc., of debtors—Loss of debts.—The measure of recovery, under contracts of this character, is varied according to the stipulations entered

Lumber Co. v. Fidelity & Cas. Ins. Co., 63 Minn. 286; 65 N. W. 353. 30 L. A. 680.

[4] Rumford Falls P. Co. v. Fidelity & C. Co., 92 Me. 574; 43 Atl. 503.

[5] Buffalo Elevating Co. v. Prussian Nat. Ins. Co., 71 N. Y. Supp. 918; 64 App. Div. 182.

[6] See Joyce on Ins. (ed. 1897) and index therein, "Cattle;" "Live stock."

[7] Indiana Farmers Live Stock Ins. Co. v. Byrkett (Ind. App.), 36 N. E. 779.

[8] Lewis v. Burlington Ins. Co. (Iowa), 45 N. W. 749; Joyce on Ins. (ed. 1897) sec. 3454.

into, the agreed compensation, the character of the loss, and the meaning of the word "loss."[9] If the insurance is against insolvency of debtors, commissions may be deducted for selling the debtors' goods before applying the proceeds on the debt.[10] But losses are not covered, after the date fixed for the expiration of the bond, even though within the time specified in said bond;[11] although recovery is not precluded because some of the debts were compromised, there being no stipulation to the contrary.[12]

§ 1542. Deductions—Set-off.—In case property insured by fire is totally destroyed there is no settled rule of deductions, with regard to the relative values of new for old, as in case of marine insurance, although the age and deterioration of the building may be considered. And generally in determining whether deductions should be made, or whether there should be a set-off or counterclaim, the nature and character of the insurance, the risk, the loss and the stipulations of the policy are to be considered and control, but irrespective of express stipulations,

[9] See Joyce on Ins. (ed. 1897) secs. 2599, 2786, 2787. See also index therein, "Agents;" "Premium;" Strouse v. American Cred. Indem. Co.; American Cred. Indem. Co. v. Strouse, 91 Md. 244; 46 Atl. 328 (construction of certificate as to initial loss and what excess covered). People v. Mercantile Cred. Guar. Co., 72 N. Y. Supp. 373; 35 Misc. 756 (construction of provisions for estimating the loss); Jaeckel v. American Credit Indemnity Co., 164 N. Y. 598; 59 N. E. 1124, aff'g 34 App. Div. 565; 54 N. Y. Supp. 505 (there was a limitation of indemnity by a provision that no loss could be proven after the policy expired); People v. Mercantile Credit Guar. Co., 55 App. Div. 594; 67 N. Y. Supp. 447; order reversed 60 N. E. 24 (a question of deductions of a certain percentage of unsettled claims from the gross loss); Goodman v. Mercantile Cred. Guar. Co., 17 App. Div. N. Y. 474; 45 N. Y. Supp. 508 (question of deductions of the stipulated per cent and what time covered and also of appropriation of payments made by insolvent); Mercantile Credit & Guar. Co. v. Littleford, 18 Ohio Cir. Ct. R. 889 (contract of indemnity for uncollectible debts is one of insurance); Murdock v. Heath, 80 Law T. N. S. 50 (against default of bank and interest on deposits until principal was paid, etc., dependent upon payment of final dividends in liquidation).

[10] Talcott v. National Credit Ins. Co., 163 N. Y. 577; 57 N. E. 1125, aff'g 28 App. Div. 75; 51 N. Y. Supp. 84.

[11] Hogg v. American Cred. Indem. Co., 172 Mass. 127; 51 N. E. 517.

[12] American Cred. Indem. Co. of N. Y. v. Strouse; Strouse v. American Cred. Indem. Co. of N. Y., 91 Md. 244; 46 Atl. 328.

certain general rules govern in case of marine policies which are not applicable to other insurances.[13] Again, deferred, unearned and not due premiums are not within a clause stipulating for deductions for indebtedness due the company.[14] And where an agent effected two policies of insurance, and gave his own note for the premium, in an action on one policy, the underwriters may set off the amount of the premium on the other policy, and having been prevented from doing so by injunction, equity will compel the principal to allow the amount to be deducted from the judgment.[15] But an alleged conversion of improvements, by the payee of any order, given by assured, upon the assurer after loss, for ground rents, cannot be set off where such improvements, as well as the lease, had been forfeited and the interest sold on foreclosure of a mechanic's lien.[16] Nor can there be a deduction, from the amount of the insurer's liability of payments, by a creditor to the indemnified in a credit policy, made before final adjustment, but after expiration of the policy and after submission of final proofs of loss, where it is stipulated in effect to the contrary.[17] In cases of life insurance, however, the policy may stipulate for deduction in case of death by the use of opiates,[18] or in consequence of a violation of criminal law.[19] So, under the Missouri statute, deductions may be made for whatever depreciation in value below the amount insured, the property may have sustained between the time of issuing the policy and the time of the loss.[20] If there is no evidence of the amount of a prior loss, or that it had been adjusted and paid, a verdict on a fire policy will stand which does not make such

[13] See Joyce on Ins. (ed. 1897) secs. 1237, 3455, 3456, 3595, 2735. Examine Cent. Dig. cols. 2162–2164, secs. 1307, 1308.

[14] National L. Assn. of Hfd. v. Berkeley, 97 Va. 971; 34 S. E. 469.

[15] Leeds v. Marine Ins. Co., 6 Wh. (U. S.) 565. But see Joyce on Ins. (ed. 1897) secs. 699–701, as to English and American authorities.

[16] Slobdisky v. Curtis, 58 Neb. 211; 78 N. W. 522.

[17] Jaeckel v. American Credit Indemnity Co., 34 App. Div. 565; 54 N. Y. Supp. 505.

[18] See Penn. v. Supreme Lodge, K. of P., 83 Mo. App. 442. See Endowment Rank, K. of P., v. Allen, 104 Tenn. 623; 58 S. W. 241.

[19] See Brown v. Supreme Lodge, K. of P., 83 Mo. App. 633. See secs. 1553–1558 herein, defenses.

[20] Orient. Ins. Co. v. Daggs, 172 U. S. 557; 43 L. Ed. 552; 19 Sup. Ct. Rep. 281; 28 Ins. L. J. 97, case affirms 136 Mo. 382; 38 S. W. 85; 26 Ins. L. J. 67; 35 L. R. A. 227.

deduction.[21] Again, deductions, which are by stipulation to be made of the unpaid part of the balance of the then current year's premium, in case of death of the insured, refers to the non-payment of the annual premium, and does not refer to the indorsements on the policy.[22]

§ 1543. Interest on amount of loss.[23]—Interest is recoverable, on the amount of loss, from the time it became payable under the terms of the insurance contract;[24] or from the date of filing proofs of death, there being no defense as to the insufficiency of the assessment fund to pay the certificate, which provides that the benefit fund in case of death shall be a sum equal to one payment to the endowment fund by each member holding an equal amount of endowment, even though insufficient to pay the amount of the policy.[25] And, in case of a refusal to pay the amount of a certificate or to levy an assessment for a death loss, interest will be allowed from a date prior to which after proofs of death, a reasonable time has elapsed, and thirty days will be such reasonable time.[26] Or interest will be allowed from the time of the breach.[27] So interest is recoverable as damages on a beneficiary certificate;[28] so upon a life policy, where entry of judgment is delayed by a motion for a new trial;[29] so under a marine insurance policy, where the company withholds the amount, admittedly due, for a long period of time, and at the end of a costly ligitation, the difference between the amount claimed and that found due is very small.[30] And an insurer, who has paid the loss by fire and taken an as-

[21] Ackley v. Phœnix Ins. Co. (Mont. 1901), 64 Pac. 665.

[22] Northwestern L. Assur. Co. v. Schulz, 94 Ill. App. 156.

[23] See Joyce on Ins. (ed. 1897) secs. 3454, 3458, 3459.

[24] Phœnix Ins. Co. v. Public Parks A. Co., 63 Ark. 187; 37 S. W. 959; Knights Templars & M. L. Ins. Co. v. Moore Parish, 80 Ill. App. 213.

[25] Endowment Rank, K. of P., v. Allen, 104 Tenn. 623; 58 S. W. 241.

[26] Glaser v. New York Physicians Mut. Aid Assn., 66 N. Y. Supp. 152.

[27] Christie v. Iowa L. Ins. Co. (Iowa, 1900), 82 N. W. 499.

[28] Grand Lodge A. O. U. W. v. Bagley, 164 Ill. 340; 45 N. E. 538.

[29] Equitable Life Assur. Co. v. Redding (U. S. C. C. A. 9th C.), 48 U. S. App. 565; 27 C. C. A. 404; 83 Fed. 85; 27 Ins. L. J. 322.

[30] New Zealand Ins. Co. v. Earnmoor S. S. Co. (U. S. C. C. A. 9th C.), 48 U. S. App. 245; 24 C. C. A. 644; 79 Fed. 368.

signment of the claim, may recover interest on the amount so paid, the property having been destroyed through negligence of another than insured.[31] But interest is not recoverable on a tontine dividend, which is, by the terms of the policy, a part thereof.[32] And where a suit was brought on a policy on a vessel and freight for a total loss, and the jury found the whole amount insured with interest and an additional sum for damages, it was decided that damages beyond legal interest were not recoverable, but the judgment was reduced.[33]

§ 1544. When amount due and payable—When interest attaches—Award.—Interest is recoverable on a policy of insurance from the time the amount becomes due and payable, and where appraisement or award by arbitrators is not a condition precedent to the right of action and it is so stipulated, the loss is due and payable after sixty days' notice, ascertainment and satisfactory proofs of loss; but where the matter of loss is submitted to arbitrators and award rendered, interest will not attach to the sum due by the insurer until after award.[34]

§ 1545. Attorney's fees—Policy as collateral with power to sell and pay expenses.—Attorney's fees are not collectible in an action concerning the proceeds of a policy, pledged as collateral with authority to sell and pay necessary expenses, but not authorizing such attorney's fees.[35]

§ 1546. Insurance—Recovery and damages—Negligence.—In the settlement of a claim, an item in the receipt stated to be for "general average" is not applicable to a claim against carriers for damages for a loss by negligence.[36] And if insured property is destroyed by actionable negligence of a railroad

[31] Texarkana & Ft. S. R. Co. v. Hartford F. Ins. Co., 17 Tex. Civ. App. 498; 44 S. W. 533.

[32] Stevens v. Germania L. Ins. Co. (Tex. Civ. App. 1901), 62 S. W. 824.

[33] Insurance Co. v. Piaggio, 16 Wall. (U. S.) 378.

[34] Reading Ins. Co. v. Egelhoff (U. S. C. C. W. D. Mo.), 115 Fed. 393, under Rev. Stat. Mo. 1899, sec. 3705. See 28 Cent. Dig. sec. 1494.

[35] De Coursey, 26 W. N. C. 88; 47 Phila. Leg. Int. 374; 20 Pitts. L. J. N. S. 407; 19 Atl. 1074.

[36] Home Ins. Co. v. Western Trans. Co., 4 Rob. (N. Y.) 257; Joyce on Ins. (ed. 1897) sec. 3454.

company, the owner may recover his entire loss from such company, even though he may have been paid by the insurer his full insurance. After recovery, the insured will hold the amount recovered equal to the sum paid by insurers for them.[37]

§ 1547. Judgment for full amount of certificate is properly rendered against an assessment life insurance company where such company has a large surplus trust fund, and so, even though it is not shown what an assessment would produce.[38]

§ 1548. Amount recoverable held in trust — Compress company.—Where bales of cotton are held for compression, or compressed, by a compress company, it may recover the full amount of insurance holding the excess, beyond that to which it is entitled, in trust for the owners, according to their several interests.[39]

§ 1549. Set-off where life policy proceeds not absolute trust fund.—Where assured had, at the time of his death, a present valuable, vendible interest in an endowment policy, payable to his executors, administrators or assigns, so that the proceeds were not an absolute trust fund incapable of diversion in the assured's lifetime, the insurer is entitled to a set-off, as against the amount due under the policy, of notes which the insured had executed during his lifetime to said insurer and which were due and payable at the time of his death, but said set-off will not include notes maturing after the decease of the insured.[40]

§ 1550. Action by insurer for homicide—Civil damages—

[37] Weber v. Morris & Essex R. R. Co., 35 N. J. L. 409; Joyce on Ins. (ed. 1897) sec. 3454. See further secs. 1509, 1510 herein as to marine insurance on ship.

[38] Covenant Mut. L. Assn. of Ill. v. Kentner, 188 Ill. 431; 58 N. E. 966, aff'g 89 Ill. App. 495.

[39] Hope Oil Mill Compress & M. Co. v. Phœnix Assur. Co., 74 Miss. 320; 21 So. 132; 26 Ins. L. J. 995. See Joyce on Ins. (ed. 1897) and index therein, "Bailee;" "Bailor;" "Commission;" "Commission merchants;" "Consignees," "Trust in trust or on commission," "Trustees;" "Warehousemen," etc.

[40] Ladd v. Union Mut. L. Ins. Co. (U. S. C. C. W. D. Mo.), 116 Fed. 878; Code, Mo. secs. 604, 605. See also Carr v. Hamilton, 129 U. S. 252; 32 L. Ed. 669; 9 Sup. Ct. Rep. 295.

Recovery back of insurance paid.—An action does not lie, by the common law nor under the civil code of Louisiana, for damages for causing death, so that the insurer cannot recover back money paid under an insurance policy where A killed B upon whose life there was a policy in favor of a third person, nor can the insurer recover the damages it has sustained by such homicide.[41]

§ 1551. Settlement procured by threats—Damages and counsel fees.—Where a settlement for a small sum is procured by threats of the assured to prosecute the insured for burning the property, damages and counsel fees may be recovered.[42]

§ 1552. Reinsurer—Proportionate amount.—Only the specified proportionate amount whichthe reinsurance sustains to the original insurance is recoverable, even though by reduction of the original insurance it becomes less than the amount of reinsurance.[43] Again, a reinsurer may become jointly liable, with a company which has retired, by assuming its risks and management and the business thereof.[44] And the reinsurer is obligated to the entire extent of the indemnity specified as payable to a prior insurer, notwithstanding the insolvency and inability to pay of the intermediate insurer, and the payment must be made in such case directly to insured or to the person ultimately entitled.[45] But reinsurers can be held for indemnity, only against loss arising under the policies in existence at the time reinsurance was effected, and are not liable to pay a loss arising under a new policy underwritten during the life of said reinsurance, although one of said original policies expired and the other was

[41] Insurance Co. v. Brame, 95 U. S. 754. See as to recovery over by insurer generally, Joyce on Ins. (ed. 1897) and index thereon "Subrogation."

[42] Watertown F. Ins. Co. v. Graham, 74 Ga. 642. See Joyce on Ins. (ed. 1897) sec. 3456. See id. sec. 514.

[43] Home Ins. Co. v. Continental Ins. Co., 62 App. Div. 63; 70 N. Y. Supp. 824. See as to reinsurer's liability, Insurance Co. of State of N. Y. v. Associated Mfrs. M. & Y. Ins. Co., 70 App. Div. 69; 74 N. Y. Supp. 1038.

[44] Whitney v. American Ins. Co., 127 Cal. 464; 59 Pac. 897. See as to reinsurer's liability, damages and defenses, Joyce on Ins. (ed. 1897) secs. 131–138, 3456.

[45] Hunt v. New Hampshire F. U. Assn., 68 N. H. 305; 38 Atl. 145; 38 L. R. A. 514. But see Herckenrath v. American Mut. Ins. Co., 3 Barb. Ch. (N. Y.) 63.

canceled, it being stipulated by the reinsurers that the risk taken was subject to the same terms and conditions as the original policies and to pay as paid thereon, and it further appearing that the valuation was changed in the new policy.[46] If the reinsurer has not been notified to defend, he is not liable for the expenses of the reinsured in defending an action on the policy.[47]

§ 1553. Defenses—Generally.—Insurance being a contract, a breach by insured of any one or more of the various stipulations in the policy or contract, may constitute a sufficient defense where no waiver or estoppel exists; or in case there are excepted risks, if the loss is within such exception of liability, there can ordinarily be no recovery. Again, the action may not be brought in the stipulated forum; or it may be prematurely brought, in view of the time limitation for suing; or there may be laches; or fraud of the agent in procuring the insurance; or fraud of the insured, either in relation to the insurance itself, or as to the loss sustained and proofs thereof.[48] So fraud is admissible as a defense in an action by the assignee.[49] But the defense of fraud, arson and perjury is not supported by a statement of a fireman that in going through the building, at the time of the fire, he discovered a box of paper with some partly burned matches therein. Charges of such a grave and serious nature should not be recklessly made, and if made in good faith and not proven they should be disavowed.[50] Again, the nonpayment of a premium note, on a life policy, will defeat recovery.[51] So the existence of an alleged conspiracy may be shown, to strengthen a probability that the insured is not dead but is fraudulently concealing himself.[52] The defense of addi-

[46] Lower Rhine & Wurtemberg Assn. v. Sedgwick, 68 L. J. Q. B. 186; [1899] 1 Q. B. 179; 80 Law T. N. S. 6; 47 Wkly. Rep. 261; 8 Asp. 466.

[47] Insurance Co. of Pa. v. Telfair, 27 Misc. (N. Y.) 247. See New York State M. Ins. Co. v. Protection Ins. Co., 1 Storey, 458.

[48] See Joyce on Ins. (ed. 1897) secs. 3731–3838.

[49] New York Mut. L. Ins. Co. v. Armstrong, 117 U. S. 591.

[50] Goodwin v. Merchants & B. M. Ins. Co. (Iowa, 1902), 92 N. W. 894, 895 per Weaver J. See Joyce on Ins. (ed. 1897) secs. 3374, 3782.

[51] Union Cent. L. Ins. Co. v. Hughes (Tex. Civ. App. 1902), 70 S. W. 1060. See Joyce on Ins. (ed. 1897) and index therein, "Notes for premiums," etc.

[52] Connecticut Mut. L. Ins. Co. v. Hillmon (U. S. C. C. A. Kan.), 46 C. C. A. 668; 107 Fed. 834. See as to

tional insurance may, however, be met by evidence raising an estoppel or waiver.[53] If the matter in dispute is merely the amount of the loss, the question of fraud is eliminated in the submission to arbitration.[54] Again, Sunday labor constitutes no defense to an action to recover for an injury under an accident policy, it not being shown that said person was not engaged in a work of necessity.[55] And the use of narcotics as prescribed by a physician does not preclude a recovery.[56] Nor is the defense of limitation available to preclude recovery of statutory damages for failure to pay a policy.[57] And procurement of money from another to pay premiums is no defense, irrespective of the terms of the contract between such third party and assured.[58]

§ 1554. Defenses—Proofs of loss; fraud, etc., in respect to.—If the policy provides that fraud before or after loss shall preclude a recovery, a presentation of a fictitious, exaggerated, and fraudulent schedule as part of the proofs of loss is within such a provision.[59] But the charge of placing a wilfully false valuation on the property destroyed may be rebutted;[60] or the proof of a greater loss than that first claimed may be explained;[61] or statements as to value may consist mostly of estimates, opinions and conjectures, and so not preclude a recovery;[62] or the estimate of value may have been placed too high, merely through

conspiracy, Joyce on Ins. (ed. 1897) sec. 2851, 2852, 3471.

[53] Turner v. Providence-Washington Ins. Co., 86 Mo. App. 387. See Joyce on Ins. (ed. 1897) and index therein "Estoppel;" "Other or double and overinsurance;" "Waiver."

[54] Kearney v. Washtenaw Mut. F. Ins. Co., 126 Mich. 246; 8 Det. L. N. 13; 85 N. W. 733.

[55] Matthes v. Imperial Acc't Assn. (Iowa, 1900), 81 N. W. 484.

[56] Endowment Rank, K. of P., v. Allen, 104 Tenn. 623; 58 S. W. 241. See Penn. v. Supreme Lodge, K. of P., 83 Mo. App. 442.

[57] Fidelity & C. Co. v. Allibone, 15 Tex. Civ. App. 178; 39 S. W. 632; error denied 90 Tex. 660; 40 S. W. 399.

[58] Merchants L. Assn. of U. S. v. Yoakum (U. S. C. C. A. Tex.), 39 C. C. A. 56; 98 Fed. 251. See Grand Lodge A. O. U. W. v. Cleghorn (Tex. Civ. App.), 42 S. W. 1043.

[59] Capital F. Ins. Co. v. Beverly, 14 Ohio C. C. 468; 8 Ohio Dec. 37.

[60] Orient Ins. Co. v. Moffatt, 15 Tex. Civ. App. 385; 39 S. W. 1013.

[61] Ætna Ins. Co. v. Strout, 16 Ind. App. 160; 44 N. E. 934.

[62] Hanscom v. Home Ins. Co., 90 Me. 333; 38 Atl. 324; 27 Ins. L. J. 19.

inadvertence, and so not constitute fraud;[63] or a false statement that certain property was in the building destroyed may be explained,[64] and a larger amount may be recovered than that claimed in the proofs of loss.[65] Again, although the proofs of death disclose facts which might be available as a defense, it will not bar an action on the policy.[66] And defendant is not estopped by a notice to plaintiff, in which it denies its liability, on the ground that the property described in its policy was not in existence when such policy was delivered, from proving that a prior policy of another company covering the same property had not been canceled when the property was burned.[67]

§ 1555. Defenses—Appraisement—Arbitration.[68]—It is no defense that appraisers have failed to fix the loss, as stipulated in the policy, where no demand has been made therefor;[69] nor is the failure to arbitrate a defense, where the insurer unreason-

[63] Erb v. German Amer. Ins. Co., 98 Iowa, 606; 67 N. W. 583; 40 L. R. A. 845.

[64] Knop v. National F. Ins. Co., 107 Mich. 323; 2 Det. L. N. 676; 65 N. W. 228; 25 Ins. L. J. 181.

[65] American Ins. Co. v. Griswold, 14 Wend. (N. Y.) 399; Dennis v. Citizens Ins. Co., 4 Pa. Super. Ct. 225.

[66] Employers Liability Assur. Corp. v. Anderson, 5 Kan. App. 18; 47 Pac. 331.

[67] Kerr v. Milwaukee Mechanics' Ins. Co. (U. S. C. C. A. 8th C. D. Neb.), 117 Fed. 442, 445. See further as to proofs of loss, defenses, waiver, estoppel, recovery, etc., Joyce on Ins. (ed. 1897) secs. 3275–3394; Sun Mut. Ins. Co. v. Crist, 19 Ky. L. Rep. 305; 39 S. W. 837; 26 Ins. L. J. 695; Names v. Union Ins. Co., 104 Iowa, 612; 74 N. W. 14; De Raiche v. Liverpool & L. & G. Ins. Co., 83 Minn. 398; 86 N. W. 425; Protected Home Circle v. Winter, 14 Ohio C. C. 194; Schmurr v. State Ins. Co., 30 Or. 29; 46 Pac. 363; 26 Ins. L. J. 373; Virginia F. & M. Ins. Co. v. Cannon, 18 Tex. Civ. App. 588; 45 S. W. 945; Flatley v. Phœnix Ins. Co., 95 Wis. 618; 70 N. W. 828. As to denial of liability, see National Union v. Thomas, 10 App. D. C. 277; 25 Wash. L. Rep. 200; Finster v. Merchants & B. Ins. Co., 97 Iowa, 9; 65 N. W. 1004; Ætna Ins. Co. v. Strout, 16 Ind. App. 160; 44 N. E. 934; Baldwin v. Fraternal Ben. Assn., 21 Misc. 124; 46 N. Y. Supp. 1016. See also as to proofs of loss, defenses, waiver, etc., 28 Cent. Dig. cols. 2172 et seq. secs. 1320 et seq.; notes 1 L. R. A. 216; 7 L. R. A. 81; 8 L. R. A. 76; 10 L. R. A. 558; 18 L. R. A. 85; 44 L. R. A. 846.

[68] See Joyce on Ins. (ed. 1897) secs. 3231–3266. Appraisement and estimate of loss under New York standard policy differs from arbitration and award at common law or under the Code. Strome v. London Assur. Corp., 20 App. Div. 571; 47 N. Y. Supp. 481.

[69] Citizens Ins Co. v. Bland, 19 Ky. L. Rep. 110; 39 S. W. 825; 26 Ins. L. J. 615.

ably delays the appraisement.[70] And if all liability is denied, there is nothing left to arbitrate and the failure so to do is precluded as a defense;[71] but if there is an express stipulation against waiver as to an appraisement, such denial does not prevent insisting that the appraisal is conclusive as to the amount of the loss.[72] If a demand for arbitration is made by insured and ignored by the insurer, the latter cannot defend an action on the policy on the ground that an appraisement was a condition precedent to recovery.[73]

[70] Harrison v. Hartford F. Ins. Co. (Iowa, 1899), 80 N. W. 309.

[71] Thomas v. Lebanon T. M. F. Ins. Co., 78 Mo. App. 268; 2 Mo. App. Rep. 242. See Glens Falls Ins. Co. v. Hite, 83 Ill. App. 549. Examine Nelson v. Atlanta Home Ins. Co., 120 N. C. 302; 27 S. E. 38; 26 Ins. L. J. 913. As to denial on the ground of fraud, see Yendel v. Western Assur. Co., 21 Misc. 348; 47 N. Y. Supp. 141; 30 Chic. Leg. News, 66.

[72] American Cent. Ins. Co. v. Bass, 90 Tex. 380; 38 S. W. 1119; 26 Ins. L. J. 718. And examine as to insured's right to claim the face value of the policy, Phœnix Ins. Co. v. Luce, 1 Ohio C. D. 210.

[73] Milwaukee Mech. Ins. Co. v. Schallman, 90 Ill. App. 280. Examine, however, generally upon this question, Western Ins. Co. v. Hall (Ala.), 24 So. 936; Sun Mut. Ins. Co. v. Crist, 19 Ky. L. Rep. 305; 39 S. W. 837; Russell v. North Amer. Ben. Assn., 116 Mich. 699; 5 Det. L. N. 113; 75 N. W. 113; National Home Bldg. & L. Assn. v. Dwelling House Ins. Co., 106 Mich. 236; Chippewa Lumber Co. v. Phenix Ins. Co., 80 Mich. 116; Marshall v. American Guard M. F. Ins. Co., 80 Mo. App. 18; 2 Mo. App. Rep. 573; Havens v. Germania F. Ins. Co., 123 Mo. 403; 27 S. W. 718; 26 L. R. A. 107; German Ins. Co. v. Eddy, 36 Neb. 461; 54 N. W. 856; 19 L. R. A. 407; Chainless Cycle Mfg. Co. v. Security Ins. Co., 64 N. Y. Supp. 1060; id. 52 App. Div. 635; 65 N. Y. Supp. 1060; Silver v. Western Assur. Co., 164 N. Y. 381; 58 N. E. 284, rev'g 54 N. Y. Supp. 27; Pretzfelder v. Merchants' Ins. Co., 116 N. C. 491; Grand Rapids F. Ins. Co. v. Finn, 60 Ohio St. 513; 42 Ohio L. J. 213; 54 N. E. 545; 71 Am. St. Rep. 736; Queen Ins. Co. v. Leslie, 47 Ohio St. 409; 24 N. E. 1072; 9 L. R. A. 45; Seibel v. Lebanon Mut. Ins. Co. (Pa.), 16 Lanc. L. Rev. 356; Phœnix Ins. Co. v. Moore (Tex.), 46 S. W. 1131; Scottish Union & Nat. Ins. Co. v. Clancey, 71 Tex. 5; Davis v. Atlas Assur. Co., 16 Wash. 232; 47 Pac. 436; Seyk v. Millers Nat. Ins. Co., 74 Wis. 67; 41 N. W. 443; 3 L. R. A. 523; Reilly v. Franklin Ins. Co., 43 Wis. 449; 28 Am. Rep. 552. Although an appraisal may be a condition precedent to a suit as stipulated, yet a joint demand for an appraisal by several insurance companies is not within the terms of an insurance policy, issued by one of the companies providing for an appraisement by two persons, one to be selected by the company and the other by the insured, who, in case of disagreement, are to call a third. There should be a separate demand. Joyce on Ins. (ed. 1897) sec. 3245, cited Palatine Ins. Co.

§ 1556. Defenses — Negligence.[74] — That the loss arose through the negligent navigation of the master, not amounting to wilful negligence, constitutes no defense to an action by the shipowners, including the master, on a marine insurance.[75] But where there is an exception of liability for loss caused by negligence, want of ordinary care, etc., it will operate according to the terms of the stipulated exception or exemption, and preclude a recovery to the extent provided.[76] Again, the failure to comply with a custom to protect plate glass windows, while snow is being shoveled from the roof, is held to be such negligence as will prevent a recovery.[77]

§ 1557. Defenses—Destruction of property by assured—Murder by beneficiary or assignee—Death by assured's criminal acts.—It may be proven that insured had set the fire, but the evidence must be relevant.[78] And if the assignee of a life policy causes the death of assured by felonious means, a recovery on the policy is defeated,[79] although murder of the insured by the assignee forfeits only his interest in the insurance, and the estate of insured is entitled to the residue.[80] But the fact that the beneficiary assassinated assured does not, in the absence of knowledge by assured of such intention, or of the agency of the beneficiary, preclude liability of the assurer to assured's heirs, on a revocation of the benefit to the assassin.[81] It is also a complete defense, under the stipulations of the contract providing for nonliability in case insured dies from the consequences

v. Morton-Scott-Robertson Co., 106 Tenn. 558; 61 S. W. 787; 30 Ins. L. J. 481, per McAllister, J.

[74] See Joyce on Ins. (ed. 1897) secs. 2832–2852.

[75] Trinder v. Thames & M. M. Ins. Co. (C. A.),[1898] 2 Q. B. 114; 78 Law T. Rep. 485; 67 L. J. Q. B. N. S. 666, aff'g 77 Law T. Rep. 80; 66 L. J. Q. B. N. S. 802.

[76] Joyce on Ins. (ed. 1897) secs. 2672, 2673. See also id. and index therein, "Excepted risks and losses;" "Negligence."

[77] Lloyds Plate Glass Co. v. Powell (Can.), 16 Rap. Jud. Queb. C. S. 432.

[78] Liverpool & L. & G. Ins. Co. v. Joy (Tex. Civ. App. 1901), 62 S. W. 546, rehearing denied, London & L. & G. Ins. Co. v. Same, 64 S. W. 786. See Joyce on Ins. (ed. 1897) sec. 2851.

[79] New York Mut. L. Ins. Co. v. Armstrong, 117 U. S. 591.

[80] New York L. Ins. Co. v. Davis, 96 Va. 737; 1 Va. S. C. Rep. 108; 32 S. E. 475; 44 L. R. A. 305.

[81] Trudeau v. Standard L. Ins. Co. (Can.), 16 Rap. Jud. Queb. C. S. 539; Joyce on Ins. (ed. 1897) sec. 2851.

of his own criminal action, to show that he met his death by being shot by a police officer, while attempting to escape with the proceeds of a robbery committed by him.[82] If, however, the death in consequence of insured's own criminal act, occurs after the policy has by its terms become incontestable, such death is not a ground of defense.[83]

§ 1558. Defenses—Suicide—Suicide not a violation of law.—Where the provision is against liability if the assured takes his own life, sane or insane, there can be no recovery, irrespective of mental condition, where assured took his own life other than accidentally.[84] So suicide of insured, while of sound mind, constitutes a defense to a beneficial association certificate, there being no stipulations to the contrary.[85] And that the insured, at the time the policy was taken out, fraudulently intended to commit suicide, may be shown by proper evidence.[86] Again, it is sufficient that the jury find by a fair preponderance of evidence that the insured committed suicide.[87] If, however, the defense of suicide is raised, the evidence is insufficient to support such defense if it fails to exclude the theory that death was accidental,[88] and the defense of suicide fails where the

[82] Prudential Ins. Co. v. Haley, 91 Ill. App. 363, aff'd Haley v. Prudential Ins. Co., 189 Ill. 317; 59 N. E. 545. See as to death in violation of law, etc., Joyce on Ins. (ed. 1897) secs. 2606–2610. See notes 6 L. R. A. 495; 9 L. R. A. 685; 13 L. R. A. 838.

[83] Sun Life Ins. Co. v. Taylor (Ky. 1900), 56 S. W. 668. As to peremptory instruction for plaintiff under defense of death by insured's criminal acts, see Prudential L. Ins. Co. v. Higbee (Ky. 1900), 57 S. W. 614.

[84] Clarke v. Equitable L. Assur. Soc. (U. S. C. C. A. 4th C. D. Md.), 118 Fed. 374. See Joyce on Ins. (ed. 1897) secs. 2635–2661, where the question of suicide, under the various policy provisions, statutes, etc., the points of sanity or insanity in connection therewith, the rule in different states, the opinions of text writers and other authorities, medical and legal, are fully considered. See also 28 Cent. Dig. secs. 1159, 1160, notes 16 C. C. A. 623; 28 C. C. A. 284; 3 L. R. A. 486; 9 L. R. A. 371; 17 L. R. A. 89; 35 L. R. A. 258. As to suicide as a defense, see Dickerson v. North Western M. L. Ins. Co. (Ill. 1902), 65 N. E. 694.

[85] Reynolds v. Supreme Conclave I. O. H., 24 Pa. Co. Ct. R. 638; 18 Lanc. L. Rev. 125; 14 York Leg. Rec. 185. See Supreme Lodge, K. of H., v. Fletcher, 78 Miss. 377; 29 So. 523. Supreme Court of Honor v. Peacock; 91 Ill. App. 632.

[86] Elliott v. Des Moines L. Assn., 163 Mo. 132; 63 S. W. 400.

[87] Kerr v. Modern Woodmen of America (U. S. C. C. A. 8th C. S. D. Iowa), 117 Fed. 593.

[88] Boynton v. Equitable Life Assur.

evidence sustains a verdict of accidental death.[89] But the question of suicide, or not, may properly be submitted to the jury.[90] Suicide is not a defense, however, under the Missouri statute of 1889,[91] where an insurance company is other than an assessment company, and it fails to either allege or prove that assured contemplated suicide at the time of becoming a member.[92] Again, it is decided that suicide is not death in violation of law under a policy omitting the suicide clause and containing an incontestable clause.[93]

§ 1559. Evidence—Value—Extent and character of loss—Amount of recovery—Expert and non-expert testimony.[94]—To justify a recovery where part of the property is destroyed, there should be some evidence on which the jury can satisfactorily base a finding of value as to the part destroyed.[95] And in determining the actual cash value of the insured buildings at the time of destruction, evidence of depreciation in the value of another building equally as old as the one destroyed is not wholly irrelevant, and it may also be shown what it would cost to rebuild the building.[96] But a question, asked a builder who

Soc., 105 La. 202; 29 So. 490; 52 L. R. A. 687. Intentional homicide may be an accident within the terms of an accident policy. Railway Officials & E. Acc. Assn. v. Drummond, 56 Neb. 235; 76 N. W. 562.

[89] Wasey v. Travelers Ins. Co., 126 Mich. 119; 7 Det. L. N. 769; 85 N. W. 459. See Landon v. Preferred Acc. Ins. Co., 167 N. Y. 577; 60 N. E. 1114, aff'g 43 App. Div. 487; 60 N. Y. Supp. 188; Grand Legion of Select Knights A. O. U. W. v. Korneman (Kan. App. 1901), 63 Pac. 292; Brown v. Sun L. Ins. Co. (Tenn. Ch. App. 1899), 57 S. W. 415.

Dischner v. Piqua Mut. Aid & Acc. Assn., 14 S. D. 436; 85 N. W. 998. See Supreme Lodge, K. of P., v. Foster, 26 Ind. App. 333; 59 N. E. 877.

[91] Sec. 5855.

[92] McDonald v. Bankers L. Assn., 154 Mo. 618; 55 S. W. 999. Suicide not a defense, when not contemplated; Logan v. Fidelity & C. Co., 146 Mo. 114; 47 S. W. 948. As to effect of Rev. Stat. of Mo. 1889, sec. 5855, providing that suicide is not a defense, etc., see Knights Templars & M. L. Ind. Co. v. Jarman (U. S. C. C. A. Mo.), 44 C. C. A. 93; 104 Fed. 638; 30 Ins. L. J. 230; Wallace v. Bankers L. Assn., 80 Mo. App. 102; 2 Mo. App. Rep. 536.

[93] Patterson v. Natural Premium M. L. Ins. Co., 100 Wis. 118; 75 N. W. 980; 42 L. R. A. 253; 27 Ins. L. J. 820.

[94] See Joyce on Ins. (ed. 1897) secs. 3755–3838.

[95] Manchester F. Assur. Co. v. Feibelman, 118 Ala. 308; 23 So. 759; 27 Ins. L. J. 855; 2 Am. Pr. Rep. 273.

[96] Cummins v. German-American Ins. Co., 192 Pa. 359; 44 W. N. C. 549; 43 Atl. 1016.

had testified to the cost of rebuilding, whether he would be willing to rebuild at those figures, is irrelevant and inadmissible.[97] It is decided, however, that the law fixes prima facie the measure of recovery at the policy amount, and therefore evidence is inadmissible as to the kind of building, its material and the length of time it had been used.[98] Again, a correct inventory, made shortly before the fire for the purpose of effecting a sale to the insured, is relevant as to the extent of the loss and to aid the jury in fixing the amount, even though said inventory was not made by insured and he did not own the goods at the time.[99] And where the account books were destroyed, the loss may be proven by the last inventory, and the amount of purchases and sales subsequently made.[100] So day books and ledgers, the correctness of which, as showing the amount and value of the goods, is testified to by the person proving them, are, in connection with his testimony, competent evidence, though they would not be so by themselves, to show such value.[1] The amount of the insurance, in connection with other evidence, is also admissible to show the cash value at the time of the loss under a policy stipulating for a cash value estimate.[2] And evidence of value is admissible where the amount found by adjustment is not conclusive upon the court as to the actual loss.[3] Again, testimony may be given as to the value of an article not in the proofs of loss,[4] and the cost, several years before, of store fixtures having no settled market value, may be proven.[5]

§ 1560. Same subject continued.—Testimony is admissible as to the value of property, where the stipulation is that the damages shall not exceed the actual cash value or cost of re-

[97] Caraher v. Royal Ins. Co., 63 Hun (N. Y.), 82; 44 N. Y. St. R. 141; 17 N. Y. Supp. 858.

[98] Davis v. Anchor Mut. F. Ins. Co., 96 Iowa, 70; 64 N. W. 687; 25 Ins. L. J. 299.

[99] Scottish Union Ins. Co. v. Stubbs, 98 Ga. 754; 27 S. E. 180.

[100] Scottish Union & N. Ins. Co. v. Keene, 85 Md. 263; 37 Atl. 33; 26 Ins. L. J. 963.

[1] Insurance Co. v. Weide, 9 Wall. (U. S.) 677. See Insurance Co. v. Weides, 14 Wall. (U. S.) 375.

[2] German Ins. Co. v. Everett (Tex. Civ. App.), 36 S. W. 125.

[3] Sergent v. Liverpool & L. & G. Ins. Co., 59 N. Y. St. R. 887; 28 N. Y. Supp. 1123.

[4] Names v. Union Ins. Co., 104 Iowa, 612; 74 N. W. 14; Kahn v. Traders Ins. Co. (Wyo.), 34 Pac. 1059; 23 Ins. L. J. 401.

[5] Johnston v. Farmers F. Ins. Co. (Mich.), 2 Det. L. N. 242; 64 N. W. 5.

placing the property.[6] And the value of the different kinds of lumber in the building may be shown, but the weight of such proof depends upon the dimensions and kinds of timber in the building as compared with the price thereof at the time of loss.[7] So, where no appraisement has been required, evidence of value of insured property may be given.[8] And the value of a stock of goods a few months before the fire may be shown, in connection with proof that its then value was about the same as at the time of fire.[9] A witness need not, however, be a carpenter in order to testify as to the cost of rebuilding, since his knowledge of the subject and the value of his testimony may be developed on cross-examination.[10] And one who prepared the inventory and testifies as to its correctness may state the value of the property shown thereby and remaining after the fire, even though he cannot remember the items in said inventory nor the value of each item.[11] So a witness may express an opinion as to the value of an article, where he testifies that he knows very near what articles of that kind are worth.[12] Nor is it necessary to prove that a witness has peculiar skill to enable him to state the value of goods, where he is familiar with the market price of such property and has frequently had occasion to estimate their value.[13] And the opinion of merchants acquainted with the stock of goods is competent as to their value.[14] So the opinions of ordinary witnesses may be given, where they are acquainted with the value of the property, even though they are not experts as to values;[15] and plaintiff may testify as to value when he is acquainted therewith.[16] So the

[6] Erb v. German-American Ins. Co., 98 Iowa, 606; 67 N. W. 583; 40 L. R. A. 845.

[7] Cummins v. German-American Ins. Co., 192 Pa. 359; 43 Atl. 1016; 44 W. N. C. 549.

[8] Springfield F. & M. Ins. Co. v. Cannon (Tex. Civ. App.), 46 S. W. 375.

[9] Caledonian Ins. Co. v. Traub, 83 Md. 524; 35 Atl. 13; 25 Ins. L. J. 791.

[10] Cummins v. German-American Ins. Co., 192 Pa. 359; 44 W. N. C. 549; 43 Atl. 1016.

[11] Coleman v. Retail Lumberman's Ins. Assn. (Minn.), 79 N. W. 588; 28 Ins. L. J. 650.

[12] Johnston v. Farmers F. Ins. Co. (Mich.), 2 Det. L. N. 242; 64 N. W. 5.

[13] Louisville Jeans Clothing Co. v. Lischhoff, 109 Ala. 136; 19 So. 436.

[14] Burnett v. American C. Ins. Co., 68 Mo. App. 343.

[15] Lewis Baillie & Co. v. Western Assur. Co., 49 La. Ann. 658; 21 So. 736; 26 Ins. L. J. 497. See Phœnix Mut. Ins. Co. v. Bowersex, 6 Ohio C. C. 1.

[16] Western Home Ins. Co. v. Rich-

plaintiff and her husband may give the value of the goods where a list thereof is in court.[17] Again, a housekeeper of several years' experience may state the value of wearing apparel and household goods, where she is familiar with the cost thereof.[18] And a retired merchant may testify as to value.[19] But a witness, whose knowledge as to the stock destroyed is limited to a certain time, is incompetent to testify as to the value thereof except as within that period of time.[20]

§ 1561. Same subject concluded.—Evidence that property is totally destroyed and that it was worth a certain amount before the fire is competent.[21] So the expense of repairs may be proven though not controlling.[22] And evidence is admissible to show the extent of the loss, under a fire policy, where it tends to prove the expenses incurred by plaintiff in repairing the injury;[23] and the cost of repairing and restoring a building is admissible evidence in determining whether a loss was total or partial.[24] So an expert witness may testify that a vessel is a total loss;[25] and expert evidence is competent upon the net value of a policy forfeited for nonpayment of premium;[26] and an opinion, showing how the value of an insurance business is affected by the fact that renewal premiums are substantially less than guaranteed by defendant, may be given by persons having a general knowledge of the insurance business.[27] An offer of settlement may be admissible in evidence where only the amount

ardson (Neb.), 58 N. W. 597; 23 Ins. L. J. 501. See Enos v. St. Paul F. & M. Ins. Co. (S. D.), 57 N. W. 919; 23 Ins. L. J. 258.

[17] Thomason v. Capital Ins. Co. (Iowa), 61 N. W. 843.

[18] Rademacher v. Greenwich Ins. Co., 75 Hun (N. Y.), 83; 27 N. Y. Supp. 155; 57 N. Y. St. R. 739.

[19] Names v. Union Ins. Co., 104 Iowa, 612; 74 N. W. 14.

[20] Metzger v. Manchester F. Ins. Co., 102 Mich. 334; 63 N. W. 650.

[21] Granite State F. Ins. Co. v. Buckstaff Bros. Mfg. Co., 53 Neb. 123; 73 N. W. 544.

[22] Sherlock v. German-American Ins. Co., 21 App. Div. 18; 47 N. Y. Supp. 315.

[23] Sherlock v. German-American Ins. Co., 162 N. Y. 656; 57 N. E. 1124, aff'g 21 App. Div. 18; 47 N. Y. Supp. 315.

[24] Royal Ins. Co. v. McIntyre, 90 Tex. 170; 37 S. W. 1068; 35 L. R. A. 672, rev'g 34 S. W. 669.

[25] McLain v. British F. & M. Ins. Co., 16 Misc. 336; 38 N. Y. Supp. 77, aff'g 70 N. Y. St. R. 248; 35 N. Y. Supp. 827.

[26] Price v. Connecticut Mut. L. Ins. Co., 48 Mo. App. 281.

[27] Graves v. Kennedy, 119 Mich. 621; 6 Det. L. N. 3; 78 N. W. 667.

of the claim is in dispute.[28] But where the invalidity of an award is relied on and a recovery of the full amount of the policy is sought, the burden rests upon assured to establish such invalidity.[29] Again, in an action to recover the money value of insured's time under an accident policy, evidence of his suffering and as to how much he slept during the injury may be given, not as an independent element of damages but as showing how far it interfered with his capacity for work.[30] And overvaluation, for the purpose of defrauding the insurer, may be proven where all liability is denied, and so, even though the policy is a valued one.[31]

§ 1562. Excessive and inadequate damages—Decisions.—A verdict is excessive which does not consider the premium tendered before action commenced.[32] And so, where the verdict is seven hundred dollars for loss of an old house which could have been newly built for seven hundred and eighty dollars, and it had depreciated in value from twenty-five to fifty per cent.[33] But a verdict will not be disturbed as inadequate, where the proof as to damage directly by lightning is inferential and uncertain as to amount, the policy covering damage by lightning.[34] Nor will a verdict be disturbed on appeal where the evidence fully supports it.[35]

[28] Kahn v. Traders Ins. Co. (Wyo.), 34 Pac. 1059; 23 Ins. L. J. 401.

[29] Springfield F. & M. Ins. Co. v. Payne, 57 Kan. 291; 46 Pac. 315; 26 Ins. L. J. 46.

[30] Globe Acc. Ins. Co. v. Helwig, 13 Ind. App. 539; 41 N. E. 976.

[31] Sullivan v. Hartford F. Ins. Co. (Tex. Civ. App.), 34 S. W. 999; error dismissed 89 Tex. 665; 36 S. W. 73; 25 Ins. L. J. 705.

[32] Insurance Co. of Ill. v. Manchaster F. Ins. Co., 77 Ill. App. 673.

[33] Guinn v. Phœnix Ins. Co. (Iowa), 45 N. Y. 880.

[34] Beakes v. Commercial Un. Assur. Co., 47 N. Y. St. R. 406; 20 N. Y. Supp. 37.

[35] Ætna Ins. Co. v. LeRoy, 15 Ind. App. 49; 43 N. E. 570.

CHAPTER LVIII.

BONDS.

§ 1563. Measure of damages — Generally—Penalty.
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1617. Surviving partner's bond.
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§ 1563. Measure of damages—Generally—Penalty.—Only such damages may be recovered against a principal or surety for the breach of the conditions of a bond, as have been actually sustained,[1] not exceeding the penalty of the bond.[2]

§ 1564. Nominal damages.—Only nominal damages can be recovered for the technical breach of the conditions of a bond where it does not appear that any actual damage or loss has been sustained.[3]

§ 1565. Recovery in excess of penalty—Interest—Costs.—The amount recoverable in case of a breach of the conditions of a bond, is not in all cases absolutely limited by the penalty, but it is a general rule that, in either an action against the principal or the surety, there may, in many cases, be a recovery of interest beyond the penalty of the bond.[4] And it has also

[1] Massey v. Schott, Fed. Cas. No. 9262, 1 Pet. (U. S. C. C.) 132; Jemison v. State, 47 Ala. 390; Ripley v. Eady, 106 Ga. 422; 32 S. E. 343; Dart v. Southwestern Bldg. & L. Assoc., 99 Ga. 794; 27 S. E. 171; State v. McGlothlin, 61 Iowa, 312; 16 N. W. 137; Rawlings v. Adams, 7 Md. 26; Wheeler v. Meyer, 95 Mich. 36; 54 N. W. 689; Wagner v. Dette, 2 Mo. App. 254; Peoples' Bldg. & L. Assoc. v. Wroth, 43 N. J. L. 70; Cairnes v. Knight, 17 Ohio St. 68; Scott v. Phillips, 140 Pa. St. 51; 21 Atl. 241; Miller v. Nichols, 1 Bailey (S. C.), 226; Spear v. Stacy, 26 Vt. 61; City of Aberdeen v. Hovey, 8 Wash. 251; 35 Pac. 1097.

[2] United States v. Magill, Fed. Cas. No. 929, aff'd 12 Wheat. (U. S.) 511; 6 L. Ed. 711; Goldhawk v. Duane, Fed. Cas. No. 5511; 2 Wash. C. C. (U. S.) 323; Tryson v. Sanderson, 45 Ala. 364; Freeman v. People, 54 Ill. 153; Sweeny v. Steele, 10 Iowa, 374; Simmons v. Garrett, 1 Kan. 511; Fraser v. Little, 13 Mich. 595; Turner v. Lord, 92 Mo. 113; 4 S. W. 420; Webb v. Fish, 4 N. J. L. 371; Brainard v. Jones, 18 N. Y. 35; Hovey v. Rubber Tip Pencil Co., 38 N. Y. Super. Ct. 428; Pevey v. Sleight, 1 Wend. (N. Y.) 518; Nansemond Timber Co. v. Rountree, 122 N. C. 45; 29 S. E. 61; Saunders v. Hughes, 2 Bailey (S. C.), 504; Cook v. Greenberg (Tex. Civ. App.), 34 S. W. 687; State v. Purcell, 31 W. Va. 44; 5 S. E. 301. But see Meinert v. Bottcher, 60 Minn. 204; 62 N. W. 276; Hutchinson v. Swartsweller, 31 N. J. Eq. 205; New Holland Turnpike Co. v. Lancaster County, 71 Pa. St. 442; Strabel v. Large, 3 McCord (S. C.), 112.

[3] United States v. Young, 44 Fed. 168; Turck v. Marshall Silver Min. Co., 8 Colo. 113; 5 Pac. 838; Taylor v. Mygatt, 26 Conn. 184; Karr v. Peter, 60 Ill. App. 209; Linder v. Lake, 6 Iowa, 164; Pond v. Merrifield, 12 Cush. (Mass.) 181; Sprague v. Wells, 47 Minn. 504; 50 N. W. 535; Middleton v. Moore, 36 Mo. App. 627.

[4] Parit v. Wallis, 2 Dall. (U. S.) 252; 1 L. Ed. 370; Tyson v. Sanderson, 45 Ala. 364; Crane v. Andrews,

been decided that costs which have been incurred by the obligee as a result of the obligor's failure to pay on demand and subsequent defense of the action to compel payment, may be recovered, though the entire recovery, by such an allowance, exceeds the penalty of the bond.[5]

§ 1566. Exemplary damages.—It has been decided that the sureties on a bond cannot be held liable in exemplary damages though the act of the principal constituting the breach of its condition was a wilful tort.[6] So also it is declared that such damages are not recoverable against the sureties on a bond for distress warrant,[7] nor on a replevin or sequestration bond.[8]

§ 1567. Duration of official bonds.—It is not necessary in all cases that an official bond be renewed annually to cover defaults in years subsequent to that in which it is given. The term for which the bond is to continue in force is to be determined in each case from the wording of the same. So a bond which provides that it is conditioned for the faithful performance of all duties by an officer of a private corporation for and during all the time he shall hold said office will cover defaults occurring in subsequent years, though it is provided by the by-laws of such corporation that the officer shall be elected annually.[9] But it

10 Colo. 265; Carter v. Carter, 4 Day (Conn.), 30; 4 Am. Dec. 177; Holmes v. Standard Oil Co. (Ill.), 55 N. E. 647, aff'g 82 Ill. App. 476; Shook v. State, 6 Ind. 113; Carter v. Thorn, 18 B. Mon. (Ky.) 613; Wyman v. Robinson, 73 Me. 384; 40 Am. Rep. 360; Warner v. Therlo, 15 Mass. 154; Mullen v. Morris, 43 Neb. 596; 62 N. W. 74; Judge of Probate v. Heydock, 8 N. H. 491; Robbins v. Long, 16 N. J. Eq. 59; Beers v. Shannon, 73 N. Y. 292; Brainard v. Jones, 18 N. Y. 35; Walcott v. Harris, 1 R. I. 404; Tazewell v. Saunders, 13 Gratt. (Va.) 354; State v. Purcell, 31 W. Va. 44; 5 S. E. 301; Whereatt v. Ellis, 103 Wis. 348; 79 N. W. 416. But see Rubon v. Stephan, 25 Miss. 253; Trice v. Turrentine, 35 N. C. 212; Kelly v. Nichols, 2 Ohio Dec. 363; Mann v. Taylor, 1 McCord (S. C.), 171; Rhea v. McCorkle, 11 Heisk. (Tenn.) 415.

[5] Dwyer v. United States, 93 Fed. 616; 35 C. C. A. 488.

[6] North v. Johnson (Minn.), 59 N. W. 1012. Compare Mobile Furniture Commission Co. v. Little, 108 Ala. 399; 19 So. 443.

[7] Hamilton v. Kilpatrick (Tex. Civ. App. 1895), 29 S. W. 819.

[8] McArthur v. Barnes (Tex. Civ. App. 1895), 31 S. W. 212.

[9] Westervelt v. Mohrenstecher, 76 Fed. 118; 40 U. S. App. 221; 22 C. C. A. 93; 34 L. R. A. 477; Merchants Bank v. Hovey, 58 Kan. 603; 50 Pac. 871; Stevens v. Orton, 18 Misc. (N. Y.) 538; 43 N. Y. Supp. 792; New German

has been decided that to render sureties liable for defaults in subsequent years, on a bond for the faithful discharge by the treasurer of a corporation of his duties "during the time for which he has been elected and for and during such further time as he may continue therein by any re-election or otherwise," there should be a continuous holding of the office.[10] Again, sureties on the bond of a municipal officer who holds over pending the election or appointment of his successor will be liable for a defalcation occurring during such period where the city charter provides that he shall hold office until his successor is elected or qualified.[11] So, also, sureties upon the bond of a sheriff may be liable for acts of his occurring before they became sureties under a statute rendering them liable for all of his official acts.[12] And likewise a tax collector's bond may cover such acts.[13]

§ 1568. Sureties liable in separate sums.—Where, by the express terms of a bond, it is provided that the sureties shall be only liable for the sums following their respective names, the liability of each surety is thereby limited to that amount and no greater recovery can be had against them, though it is provided in the bond that they are jointly and severally bound, as such provision will be construed as meaning that they are so bound with the principal and not with the other sureties.[14]

§ 1569. Effect of failure to notify surety of defalcation.—Where the surety in a bond is not notified by the obligee of the defalcation of the principal, who is retained by the obligee in his employ, only the amount of the defalcation at the time of the first discovery can be recovered from the surety and he cannot be held liable for subsequent defalcations.[15] But it

Loan & B. Co. v. Kuehuert, 6 Ohio Dec. 502; Fink v. Farmers Bank, 178 Pa. St. 154; 35 Atl. 636. Compare Ulster County Sav. Inst. v. Ostrander, 15 App. Div. (N. Y.) 173; 44 N. Y. Supp. 181; First Nat. Bank v. Briggs, 69 Vt. 12; 37 Atl. 231; 37 L. R. A. 845.

[10] Middlesex, etc., Co. v. Lawrence, 1 Allen (Mass.), 339.

[11] Baker City v. Murphy, 30 Oreg. 405; 42 Pac. 133; 35 L. R. A. 88.

[12] Sabin v. Barnett, 79 Fed. 947.

[13] Pearce v. State, Breazeale, 49 La. Ann. 643; 21 So. 737.

[14] Hanna v. Savage, 8 Wash. 432; 37 Pac. 294; 36 Pac. 269, modifying on rehearing, 7 Wash. 414; 35 Pac. 127.

[15] Donnell Mfg. Co. v. Jones, 49 Ill. App. 327.

is decided that this rule does not apply in the case of mere breaches of duty or contract obligations, which do not involve dishonesty on the employee's part or fraud and concealment on the part of the principal.[16]

§ 1570. Breach of contract to become surety.—For the breach of a contract to become a surety on the bond of another, the latter may recover from the former such expense as he has sustained in supplying a new bond, and this is not altered by the fact that the defendant was only one of several sureties, where, as a result of such breach, a wholly new bond becomes necessary.[17]

§ 1571. Sureties on statutory official bonds.—The measure of damages recoverable from sureties on statutory official bonds is declared to be that contemplated by the statute though the terms of the bond may bear a broader construction.[18]

§ 1572. Fidelity bonds—Set-off.—The surety upon a bond, which recites the appointment of a firm as the sole agents of a corporation for the sale of the latter's merchandise and which is conditioned for the accounting by such firm to the corporation for all money due the latter, is not liable for moneys which are due for goods sold to such firm by the corporation,[19] and the sureties on such a bond are not liable for money which was misappropriated by one member of such firm after its dissolution and the retirement of the other partner from business.[20] Again, in an action of debt upon a bond conditioned for the faithful performance by an agent of his duties and the turning over of moneys received there cannot be a set-off of unliquidated damages.[21]

§ 1573. Indemnity bonds.—In an action to recover upon an indemnifying bond, for the unlawful seizure and conversion

[16] Lancashire Ins. Co. v. Callahan, 68 Minn. 277; 71 N. W. 261.

[17] Samuel v. Fidelity & Casualty Co., 49 Hun (N. Y.), 122; 16 N. Y. St. R. 917, aff'd 121 N. Y. 660.

[18] Lowe v. Guthrie, 4 Okla. 287; 44 Pac. 198.

[19] Jones & H. Co. v. McQueety, 3 Ohio N. P. 218; 4 Ohio Dec. 419.

[20] Standard Oil Co. v. Arnestad, 6 N. D. 255; 34 L. R. A. 861; 69 N. W. 197.

[21] American Bldg. L. & I. Co. v. Booth, 17 R. I. 736; 24 Atl. 779.

of goods, the measure of damages is their value at the time of seizure, with interest from that date, and it is decided that there cannot be a diminution of such recovery by an allowance for costs of such unlawful sale, although made by a receiver, where he was not appointed in an action against the plaintiffs or with their assent.[22] And, in such an action, evidence is admissible of the price which such goods brought at a receiver's sale and at which similar goods were sold at auction, upon the question of their actual or market value at the time and place of conversion.[23] Again, in an action upon a bond given to indemnify the obligee for all loss, damage and liability arising from or by reason of any debt or contracts, maritime or otherwise, made or contracted prior to a specified date, recovery may be had of the obligors for loss caused to the obligee by the libel and detention of a vessel for nonperformance of a contract without regard to whether such contract was valid and enforceable.[24] But where payment is guaranteed by a surety of merchandise purchased by his principal to a certain amount to be shipped to a specified destination, no recovery can be had against the former for shipments consigned to the latter at other points.[25] And where a person has given a bond to indemnify one who has agreed to lend money for the construction of buildings, against any claims on account of mechanics' liens, it has been decided that the recovery will be limited to liens for work called for by the contract of construction existing when the bond was given.[26] So also in the case of a bond guaranteeing the payment of all moneys by an employee for which he may become indebted "as for the present or any future agreement between them," the recovery will be limited to indebtedness growing out of the contracts of employment, where it was entered into in view of the contemplated employment of the principal by the party guaranteed.[27] And in the case of one who guarantees corporate bonds, which are secured by a mortgage, the extent of his liability will be de-

[22] Perkins v. Ewan, 66 Ark. 175; 49 S. W. 569.

[23] Perkins v. Ewan, 66 Ark. 175; 49 S. W. 569.

[24] Niagara Falls Paper Co. v. Lee, 20 App. Div. (N. Y.) 217; 47 N. Y. Supp. 1.

[25] Welke v. Pabst Brew. Co., 74 Ill. App. 152.

[26] Hurst v. Randall, 68 Mo. App. 507.

[27] John A. Tolman Co. v. Griffin, 111 Mich. 301; 69 N. W. 649; 3 Det. L. N. 674.

termined by the amount for which the mortgaged property is sold and not by the amount which the bondholders, who purchased the property, ultimately received for it.[28] Again, in the absence of proof of actual damage, it has been decided that there can be no recovery upon a bond conditioned to indemnify the plaintiff "against any legal liability which he may have incurred," as a result of delivering to the defendant goods, subject to a lien for freight charged in favor of another—from whom the plaintiff had received them—without collecting such charges upon receipt of such bond.[29]

§ 1574. Administrator's bond.—Where the bond of an administrator, for the sale of land to pay debts, is conditioned that he shall make a faithful appropriation of the proceeds of the sale "according to law and his respective duties," and an amount is retained by him by order of the court, during the life of the widow, on which she is to be paid interest during her lifetime, the surety will be liable for such amount where it is lost by the subsequent insolvency of the administrator.[30] But for the misfeasance of an administrator in failing to account for the proceeds of a draft indorsed to him in his individual capacity for collection by a distributee of the estate, his sureties will not be liable.[31] Nor are they liable for money received by their principal as purchase money for real property forming part of the estate, but not administered, which he failed to turn over to an heir entitled thereto, where such heirs were of age, and conveyed the property directly to the purchaser.[32] Nor, where there are sufficient funds to pay all debts of an estate, can recovery be had on the bond, for the payment by the administrator of a claim against the estate prior to the payment of a claim preferred before it, in violation of statute.[33] So also where some of the next of kin were neither cited nor appeared at a final accounting as required by code, it has been decided that the sureties on an administrator's bond are not liable for his failure

[28] Owen v. Potter, 115 Mich. 556; 73 N. W. 977; 4 Det. L. N. 989.

[29] Weller v. Eames, 15 Minn. 461; 2 Am. Rep. 150.

[30] Com. Brainerd v. McGovern, 4 Pa. Super. Ct. 598.

[31] Bird v. Mitchell, 101 Ga. 46; 28 S. E. 674.

[32] Johnson v. Hall, 101 Ga. 687; 29 S. E. 37.

[33] Masterson v. Cauble, 15 Ind. App. 515; 41 N. E. 477.

to comply with a decree of the surrogate on such accounting directing a distribution of assets remaining in his hands.[34]

§ 1575. Appeal and supersedeas bonds.—Such damages may be recovered from the surety on an appeal bond as are the natural and proximate result of the appeal.[35] And the recovery should be according to the terms of the bond though it is defective or insufficient.[36] The liability of sureties however cannot be extended by the fact that the bond is given in a greater sum than is required by statute.[37] Nor by proof by extrinsic evidence that the obligee in the bond and the plaintiff bringing suit thereon are one and the same person.[38] And the recovery may be limited to nominal damages where no actual damages are shown.[39] It has been decided however that this rule limiting the recovery to nominal damages in such a case has no application to an action upon an apprentice's bond, where it is proved that the health of the apprentice has been impaired by the master's improper treatment, although no evidence is produced showing the extent of the damage; and in such a case it is declared not to be error to instruct the jury that they may inquire if there is damage from that cause and fix the amount thereof.[40] In actions to recover for the breach of the condition of an appeal bond it has been determined that the proper measure of damages is the amount of the judgment with interest and costs.[41] And sureties upon a supersedeas bond will not be liable for an item for damages caused by the supersedeas, where the court is unable to say from the record what damages the plaintiff has sustained by reason thereof.[42] And where such a bond is given in the ordinary form by an owner appealing from a judg-

[34] McMahon v. Smith, 20 Misc. (N. Y.) 305; 45 N. Y. Supp. 663, aff'g 18 Misc. 749.

[35] Fulton v. Fletcher, 26 Wash. L. Rep. 52; 12 App. D. C. 1.

[36] Weigley v. Moses, 78 Ill. App. 471.

[37] Williams v. Vaughan (Tex. Civ. App.), 43 S. W. 850.

[38] Tobin v. French, 80 Ill. App. 47.

[39] Midland R. Co. v. Holloran, 14 Ind. App. 392; 42 N. E. 1035.

[40] Waddell, Creech v. Creech, 98 N. C. 155; 3 S. E. 814.

[41] Smith v. Pendergast, 82 Fed. 504; Centralia & C. R. Co. v. Henry, 31 Ill. App. 456; Roberts v. Lovitt, 13 Ind. App. 281; 41 N. E. 554; Clancey v. Johnson (Tex. Civ. App.), 27 S. W. 315.

[42] Northwestern & P. H. Bank v. Griffiths, 18 Wash. 69; 50 Pac. 591.

ment personally against the contractor and adjudicating a mechanic's lien upon the land, it has been decided that the sureties will not be liable for the payment of the personal judgment.[43] Again, where an appeal bond is given in an action involving the possession of land,[44] damages may be recovered for the withholding of such land, or for any injury thereto.[45] And there may be a recovery for deterioration of real estate, during an appeal, in an action upon a supersedeas bond given on appeal from a decree subjecting such property to sale, where the bond is conditioned as required by statute for the payment of all damages which may accrue.[46] So also, loss of rents may in some cases be included in the damages recoverable upon an appeal or supersedeas bond.[47] But the surety on an appeal bond of defendant in ejectment is not liable for rents paid by such defendant to a trustee under a mortgage.[48] Again, where a supersedeas bond is given on appeal from a judgment directing a sale of shares of mill stock for the benefit of an estate, conditioned to pay all damages which during the pendency of the appeal may accrue by reason thereof, there may be a recovery for loss in value of stock caused by mismanagement of the corporation pending the appeal.[49] So also, it has been decided that interest may be allowed on the amount of damages awarded in actions on such bonds.[50] But fees and expenses incurred by appellee in defending and defeating the appeal are not recoverable in an action on a supersedeas bond.[51]

[43] Sosman v. Conklin, 65 Mo. App. 319.

[44] Cahill v. Citizens M. B. Assoc., 74 Ala. 539; Chladek v. Brown, 58 Ill. App. 379. Compare Burgess v. Doble, 149 Mass. 256.

[45] Chladek v. Brown, 58 Ill. App. 379.

[46] Hargis v. Mayes, 20 Ky. L. Rep. 1905; 50 S. W. 844; Turner v. Johnson, 20 Ky. L. Rep. 2009; 50 S. W. 675. See Cook v. Marsh, 44 Ill. 178.

[47] Stults v. Zohn, 117 Ind. 297; 20 N. E. 154; Thompson v. Thompson, 22 Ky. L. Rep. 784; 58 S. W. 792; Morris v. Hunken, 40 App. Div. (N. Y.) 129; 57 N. Y. Supp. 712; Norton v. Davis, 13 Tex. Civ. App. 90; 35 S. W. 181. Where a bond recited that the obligors are bound in a certain amount "and the rental value of the land" the addition of such clause does not enlarge the penalty of the bond. Guess v. Letson, 9 Kan. App.—; 57 Pac. 1053.

[48] Adams v. Gilchrist, 63 Mo. App. 639; 2 Mo. A. Rep. 936.

[49] Welch v. Welch, 20 Ky. L. Rep. 1990; 50 S. W. 687.

[50] Van Meter v. Parker, 19 Ky. L. Rep. 1229; 43 S. W. 200; Chandler v. Thornton, 4 B. Mon. (Ky.) Jenkins v. Hay, 28 Md. 547; Whereatt v. Ellis, 103 Wis. 348; 79 N. W. 416.

[51] Turner v. Johnson, 20 Ky. L. Rep. 2009; 50 S. W. 675.

Nor can there be a recovery for attorney's fees on the appeal.[52] And costs not taxed cannot be recovered as damages in an independent action on the undertaking on appeal.[53] Again, in an action on an appeal bond credit should not be given to the principal for an item on which he was allowed credit in the original action.[54]

§ 1576. Assignee in insolvency—Bond of.—Where the bond of an assignee in insolvency is conditioned that he shall in all things discharge his duties as such pursuant to all orders previously or thereafter entered, there may be a recovery from the sureties thereon for money or property of the estate which should be in his possession at the time, and which had been previously disposed of by him in violation of his duty and the orders of the court.[55]

§ 1577. Attachment bonds.—The plaintiff should show, in an action upon an attachment bond, that some actual damage has been sustained by him,[56] and only the actual damages are recoverable and not those which are remote or speculative.[57] So also, the damages should be limited to those which arise from the acts of the attaching party and should not include those caused by attachment proceedings by another party closely connected in point of time and subject-matter with the former proceeding.[58] It has been decided, however, that the liability of the sureties on such a bond may be for the total amount of the injury sustained by reason of a wrongful levy and is not limited to the amount specified in the bond.[59] Again, their liability on a bond to secure the release of attached property is not to be

[52] Welch v. Welch, 20 Ky. L. Rep. 1990; 50 S. W. 687.

[53] Kellogg v. Howes, 93 Cal. 586; 29 Pac. 230.

[54] Wyckoff S. & B. v. Bishop, 115 Mich. 114; 73 N. W. 392; 4 Det. L. N. 914.

[55] Moulding v. Wilhartz, 169 Ill. 422; 48 N. E. 189, aff'g 67 Ill. App. 659.

[56] Winsor v. Orcutt, 11 Paige (N. Y.), 578; Peck v. Day, 1 N. Y. Leg. Obs. 312.

[57] Schloss v. Rovelsky, 107 Ala. 596; 18 So. 71; Birmingham Dry Goods Co. v. Finley (Ala.), 25 So. 138; Groat v. Gillespie, 25 Wend. (N. Y.) 383; Fleming v. Gillespie, 7 Okla. 430; 54 Pac. 653.

[58] State, Copening v. Ryley, 76 Mo. App. 412; 1 Mo. A. Rep. 548.

[59] Cassani v. Dunn, 60 N. Y. Supp. 756.

determined by the approximate value stated in the officer's return but by the actual value of such property.[60] So also, there may be a recovery on an attachment bond for any direct loss, damage or expense produced or occasioned.[61] And where a claimant of attached property gives a bond and takes possession of the property, there may be a recovery in an action on such bond of the value of the attached goods, with interest from the time of delivery.[62] Where, however, goods have been sold as perishable property, their value is not to be determined by the price received at such sale, but the real value thereof when seized may be recovered.[63] The value of the use of attached property during the period of its detention is also recoverable as damages.[64] And loss of profits which might have been realized from the performance of a contract may be allowed, where teams and utensils necessary to perform such contract have been wrongfully seized and sold in attachment proceedings.[65] So also, evidence is admissible as to the extent of a merchant's business and the rate or average of his net profits,[66] or that his customers went elsewhere after the suing out of the attachment.[67] Again, where the property has depreciated in value between the time of suing out the attachment and dissolution of the same, there may be a recovery therefor.[68] And for loss attributable to the negligence of the attaching creditor, who was put in charge of the property as keeper, there may be a recovery against the principal, on the bond given to indemnify the officer for attaching the goods, though it is declared that the sureties are not liable where they did not assent to or even know of the appointment of the keeper.[69]

[60] Eisenbud v. Gellert, 26 Misc. (N. Y.) 367; 55 N. Y. Supp. 952.

[61] Travelling expenses in attending to the attachment suit are held recoverable. State, Cole v. Shobe, 23 Mo. App. 474.

[62] Bruck v. Feiner, 26 Misc. (N. Y.) 724; 56 N. Y. Supp. 1025.

[63] Woolner v. Spalding, 65 Miss. 204; 3 So. 583.

[64] State, Burton v. McKeon, 25 Mo. App. 667; Bruce v. Coleman, 1 Handy (Ohio), 516; Munnerlyn v. Alexander, 38 Tex. 125.

[65] State, Mundy v. Andrews (W. Va.), 19 S. E. 385. See Carpenter v. Stevenson, 6 Bush (Ky.), 259.

[66] Pollock v. Gantt, 69 Ala. 373; 44 Am. Rep. 519.

[67] Birmingham Dry Goods Co. v. Finley (Ala.), 26 So. 138.

[68] Frankel v. Stern, 44 Cal. 168; Doll v. Cooper, 9 Lea (Tenn.), 576.

[69] Briggs v. McDonald, 166 Mass. 37; 43 N. E. 1003.

§ 1578. Same subject continued.—Where an attachment bond is conditioned to be void if the goods are returned after judgment, or if the judgment is paid, the measure of damages will be the value of the goods, though a judgment for a larger sum is rendered, where the bond is given under a statutory provision making it a substitute for the goods attached.[70] But if the condition of a bond to secure the release of attached property is that the defendant will perform the judgment of the court, the measure of damages is then prima facie the amount of the judgment and costs, with interest.[71] There cannot, however, be any recovery as a part of the actual loss for any injury to credit.[72] Nor is the fact that, before suing out the attachment, the attaching plaintiff seized the goods under a writ in detinue, an element of damages,[73] nor is the depreciation of real property upon which a writ of attachment has been levied, occurring while the levy remains in force, if there is no change in possession, an immediate result of the attachment for which a recovery may be had in an action upon the bond.[74] Again, it is decided that interest is not recoverable on money suspended during an attachment, by an assignee of a bond which was given by an attachment creditor to the sheriff to indemnify the latter from all suits, actions, damages, costs and charges that shall or may accrue to him by reason of the executing of the writ and conditioned that he would prosecute with effect.[75]

§ 1579. Same subject—Attorney's fees—Costs.—It has generally been decided that reasonable attorney's fees expended in defense of attachment proceedings may be recovered in an action upon the attachment bond.[76] And in Pennsylvania it

[70] Pearce v. Maguire, 17 R. I.—; 20 Atl. 98. See Stevens v. Wolf, 77 Tex. 215; 14 S. W. 29.

[71] Winton v. Myers (Okla.), 58 Pac. 634.

[72] Holliday v. Cohen, 34 Ark. 707; Lowenstein v. Monroe, 55 Iowa, 82; Seattle Crockery Co. v. Haley (Wash.), 33 Pac. 650.

[73] Jefferson County Sav. Bank v. Elborn, 84 Ala. 529; 4 So. 386.

[74] Tisdale v. Major, 106 Iowa, 1; 75 N. W. 663.

[75] Clement v. Courtright, 9 Pa. Super. Ct. 45; 43 W. N. C. 262.

[76] Green Fruit Importing, etc., Co. v. Pate, 99 Ga. 60; 24 S. E. 455; Fourth Nat. Bank v. Mayer, 96 Ga. 728; 24 S. E. 453; Union Mill Co. v. Prenzler, 100 Iowa, 540; 69 N. W. 876; Tyler v. Safford, 31 Kan. 608; 3 Pac. 333; McClure v. Renaker, 21 Ky. L. Rep. 360; 51 S. W. 317; Accessory Transit Co. v. McCerren, 13 La. Ann. 214; Swift v. Plessner, 39 Mich. 178; Buckley v. Van Diver, 70

has been declared that all legal costs, fees, expenses and damages sustained by reason of the attachment may be recovered, where not indirect or consequential.[77] But costs, expenses and attorney's fees which were incurred by an attachment defendant in the defense of a suit upon its merits, after the dissolution of the attachment by the giving of a redelivery bond, are not recoverable upon the original bond given by the plaintiff.[78]

§ 1580. Same subject—Exemplary damages.—Under the statutes in some states exemplary damages may be recovered in an action upon an attachment bond.[79] But it is declared in Alabama that to authorize the recovery of such damages in that state it should be alleged that the attachment was sued out without the existence of the statutory ground therefor and that there was no probable cause for believing that the ground upon which the writ was sued out existed.[80] And in Tennessee it is decided that exemplary damages are not recoverable unless it appear that the attachment was sued out wantonly, maliciously, or for the purpose of oppressing and harassing the defendant.[81]

§ 1581. Same subject—Mitigation of damages.—The sale of the property and the application of the proceeds may be shown by the defendant in mitigation of the damages in an action upon

Miss.; 12 So. 905; State, Clifford v. Beldsmeier, 56 Mo. 226; State, Hirsch v. Silverstein, 77 Mo. App. 304; 1 Mo. App. Rep. 599; State, Rigby v. Goodhue, 74 Mo. App. 162; 1 Mo. App. Rep. 209; Raymond v. Green, 12 Neb. 215; 41 Am. Rep. 763; 10 N. W. 709; Territory, Lyser v. Rindscoff, 5 N. M. 93; 20 Pac. 180; Baere v. Armstrong, 26 Hun (N. Y.), 19; Maxwell v. Griffith, 20 Wash. 106; 54 Pac. 938. But see Jacobus v. Monongahela Nat. Bank, 35 Fed. 395; Patton v. Garrett, 37 Ark. 605; Heath v. Lent, 1 Cal. 410; Frost v. Jordan, 37 Minn. 544; 36 N. W. 713; Moore v. Lowrey, 74 Miss. 413; 21 So. 237; Tebe v. Betancourt, 73 Miss. 868; 19 So. 833; State, Thrasher v. Heckart, 62 Mo. App. 427.

[77] Com. Cord. v. Magnolia Villa Land & I. Co., 163 Pa. St. 99; 29 Atl. 793; 35 W. N. C. 87.

[78] State, Russell v. Fargo, 151 Mo. 280; 52 S. W. 199.

[79] Hamilton v. Maxwell, 119 Ala. 23; 24 So. 769; City Nat. Bank v. Jeffries, 73 Ala. 183; Reeves v. John (Tenn. Ch. App.), 43 S. W. 134; Seattle Crockery Co. v. Haley, (Wash.) 33 Pac. 650; Sloan v. Langert (Wash.), 32 Pac. 1015.

[80] Hamilton v. Maxwell, 119 Ala. 23; 24 So. 769.

[81] Reeves v. John (Tenn. Ch. App.), 43 S. W. 134.

an attachment bond.[82] But where merely compensatory damages are sought, they cannot be mitigated by the existence of a legal right to attach.[83] Nor can the amount of the attaching creditor's legitimate demand against the attachment debtor be considered in reduction of the damages recoverable on the bond for the wrongful suing out of the attachment.[84] And the amount which the attaching officer is entitled to recover against the principal and sureties on an indemnity bond cannot be reduced by his failure to pay the judgment recovered against him for conversion of the property, since it was the duty of either the principal or a surety to pay the judgment, and by so doing secure title to the goods.[85]

§ 1582. Bail bonds.—The measure of damages in an action upon a bail bond will be the amount of the recovery in the original suit, with interest.[86] But where the plaintiff in such an action had collected the amount of the judgment from the sureties on the undertaking given on appeal to the general term in New York state, it was decided that the recovery on the bail bond would be limited to the unpaid costs of the appeal to the court of appeals, and that there could be no recovery for the judgment either by the plaintiff or the sureties on the appeal bond given in the court below.[87] Again, it has been held that the insolvency of the debtor may be shown by the defendant in such an action.[88] And in an action on a poor debtor's recognizance, given on arrest in mesne process, the recovery against the surety will be limited to nominal damages, notwithstanding a default by the debtor, where the latter obtained his discharge in insolvency after such default, under a statute which provides that

[82] Bennett v. Brown, 31 Barb. (N. Y.) 158.

[83] Lobenstein v. Hymson, 90 Tenn. 606; 18 S. W. 250. See Schofield v. Territory, American Valley Co., 9 N. M. 526; 56 Pac. 306.

[84] Hundley v. Chadick, 109 Ala. 575; 19 So. 845.

[85] Briggs v. McDonald, 166 Mass. 37; 43 N. E. 1003.

[86] Leech v. Pirani, 5 Ark. 118; Richards v. Morse, 36 Me. 240; Simmons v. Kelly, 39 N. J. L. 438; Mabbett v. Kelly, 2 How. Prac. (N. Y. 62.

[87] Culliford v. Walser, 158 N. Y. 65; 52 N. E. 648, rev'g 3 App. Div. 266; 73 N. Y. St. R. 648; 38 N. Y. Supp. 199.

[88] Sargent v. Pomeroy, 33 Me. 388; Brown v. Paxton, 19 Up. Can. Q. B. 426; But see Hall v. White, 27 Conn. 488.

judgment shall be entered for the amount of the penalty but that execution shall issue for only so much as may be justly and equitably due.[89]

§ 1583. Bank cashier's bond.—Recovery may be had from the sureties on the bond of a bank cashier, who has embezzled money from time to time, of the sum of such embezzlements, with interest thereon from the time taken.[90]

§ 1584. City clerk's bond.—Where such a bond is conditioned for the payment over of all moneys which shall come into his hands by virtue of his office, and that he shall faithfully account for the balance of money remaining in his hands, the sureties will not be liable for his failure to pay over money which has been collected by him without authority of law.[91]

§ 1585. City treasurer's bond.—Recovery cannot be had upon the bond of a city treasurer for his failure to pay warrants drawn for future receipts where such warrants do not appear upon their face to be valid.[92] And the forcible taking of money in his custody by robbers may be a defense to an action on his bond.[93]

§ 1586. Clerk of court—Bond of.—The sureties may be liable for the failure of a clerk of court to enter an attachment on the attachment docket as required by law,[94] and for failure to enter a decree, as a result of which all of the defendant's property was swept away by junior liens, the measure of damages will be the amount of the decree, if the property was sufficient to have paid it, but if not the liability will be limited to the amount which could have been realized if the decree had been properly entered.[95] So also recovery may be had from the sureties for his failure to pay over at the expiration of his term, fees

[89] Hopwood v. Smith, 170 Mass. 428; 49 N. E. 628.

[90] McShane v. Howard Bank, 73 Md. 135; 20 Atl. 776; 10 L. R. A. 552.

[91] Lowe v. Guthrie, 4 Okla. 287; 44 Pac. 198.

[92] East St. Louis v. Flannigan, 69 Ill. App. 167.

[93] Healdsburg v. Mulligan, 113 Cal. 205; 33 L. R. A. 461; 45 Pac. 337.

[94] Stewart v. Sholl, 99 Ga. 534, 26 S. E. 757.

[95] Strain v. Babb (S. C.), 9 S. E. 271.

earned by the sheriff and collected by the clerk, to which the sheriff was not entitled because of a full settlement of his affairs with the county.[96] But it has been decided that the sureties are not liable for the loss of money paid to the clerk in vacation which he fails to return into court, since such payment is not equivalent to the payment of money into court as provided by statute.[97]

§ 1587. Constable's bond.—In an action by a mortgagee upon a constable's bond for failure to retain possession of the mortgaged property until the mortgage was satisfied, only such damages can be recovered as were actually sustained, and the mortgage must still be enforced if the property is subject to it.[98] And no recovery can be had upon the official bond of a constable for failure to pay over school taxes collected by him where, by statute, a constable when appointed collector of such taxes should give a bond as such.[99] It has been decided, however, that for tortious acts committed under color of his office, recovery may be had on his official bond.[100] So the sureties have been held liable for an illegal arrest made by him while acting as constable, and under color of his office.[1] And they are also liable where he seizes and sells exempt property under a memorandum which he believes gives him authority to so act, although in fact it confers no such authority.[2] Again, it cannot be set up in defense or in mitigation of damages, in an action on the bond for failure of a constable to return property taken under a writ of detinue, after a forthcoming bond had been furnished as provided by law, that the property was not owned by the defendant in the detinue suit or that his interest was only a qualified one.[3]

§ 1588. Contractor's bond.—In the absence of some proof of actual damage it has been decided that no recovery can be

[96] Weisenborn v. People, 58 Ill. App. 114, 116.

[97] State, Blake v. Enslow, 41 W. Va. 744; 24 S. E. 679.

[98] McDaniel v. State, McHugh, 118 Ind. 239; 20 N. E. 739.

[99] Stoneboro School Dist. v. Jenkins, 17 Pa. Co. Ct. 153.

[100] Couch v. Davidson, 109 Ala. 313; 19 So. 507.

[1] State, Warren v. Boyd, 120 N. C. 56; 26 S. E. 700.

[2] State, Burris v. Edmundson, 71 Mo. App. 172.

[3] Elrod v. Hamner, 120 Ala. 463; 24 So. 882.

had by a city for breach of a penal bond conditioned for the construction of a street railway by a given time.[4] And for the breach of a condition in a bond to build a house upon the obligor's own land, in which no interest in the obligee is shown, only nominal damages are recoverable.[5] Where, however, in consideration of the conveyance of land, as a bonus for a cable railway, a bond is given conditioned for its construction, the measure of damages, for a total breach of such bond, will be the value of the land conveyed to the extent of the penalty of the same.[6] And the obligee in a bond given to indemnify him on account of the delivery of a bond and mortgage to a contractor as an advance payment on the contract price, may, where the contractor has disposed of the same and failed to perform any part of his contract, recover on the bond the amount of the mortgage representing the advance payment.[7] And where a contractor agrees to furnish all materials but the contract contains no stipulation that he shall pay therefor, it has been decided that the sureties on his bond for the faithful performance of the contract will not be liable to third persons for material furnished him.[8] Where, however, a bond is conditioned for the delivery of the building free from mechanics' liens, the sureties thereon will be liable for the amount in excess of the contract price which the owner was obliged to pay to satisfy mechanics' liens for labor and material furnished the contractor.[9] So also, they will be liable to a subcontractor for materials furnished where the bond is conditioned for the payment of all labor and materials.[10] But where the condition of a bond is for the payment of all liens for labor, material, or otherwise, no recovery can be had thereon by subcontractors for a deficit for which they have no lien.[11] And where a bond guarantees the faithful performance of the work, and "that the contractor shall promptly pay all debts incurred

[4] Aberdeen v. Honey, 8 Wash. 251; 35 Pac. 1097.

[5] Sprague v. Wells, 47 Minn. 504; 50 N. W. 535.

[6] Blewett v. Front Street Cable R. Co., 51 Fed. 625; 2 C. C. A. 415, aff'g 49 Fed. 126.

[7] Union Trust Co. v. Citizens Trust & S. Co., 185 Pa. St. 217; 39 Atl. 886; 42 W. N. C. 55.

[8] Sterling v. Wolf, 163 Ill. 467; 45 N. E. 218.

[9] McMenomy v. White, 115 Cal. 339; 47 Pac. 109.

[10] King v. Murphy, 49 Neb. 670; 68 N. W. 1029; Fitzgerald v. McClay, 47 Neb. 816; 66 N. W. 828.

[11] Spalding Lumber Co. v. Brown, 171 Ill. 487; 49 N. E. 725, aff'g 71 Ill. App. 199.

by him," there can be no recovery thereon for debts of subcontractors.[12] Again, in an action upon the bond of a subcontractor for the faithful performance of his contract, there may be a recovery as damages of the amount which the principal contractor has been obliged to allow to the owner upon the original contract by reason of the breach on the part of the subcontractor.[13] But for materials furnished to a subcontractor, for which the contractor is not liable, no recovery can be had against the sureties on a bond given by the former to such contractor.[14] And where the damages are unliquidated and equal to the full penalty of the bond, interest should not be allowed from the date of the breach of the bond.[15] Nor should the damages on such a bond include counsel fees incurred in defending proceedings for the enforcement of mechanics' liens against the property, unless they are expressly provided for in the contract.[16]

§ 1589. Conveyance bond.—Only the actual damages sustained are recoverable in an action upon a bond conditioned for the conveyance of land, the amount stated in the bond being regarded as merely a penalty.[17] And where a bond is conditioned to secure the conveyance of certain property, the actual value of such property is declared to be the measure of damages.[18] But for the mere technical breach of a bond to give a quitclaim deed to property only nominal damages are recoverable.[19]

§ 1590. Costs—Bond for.—A bond "for costs in this case" will render the sureties liable both for costs which accrued before the date of the bond and those which subsequently accrue, including the costs on appeal.[20] And in suits removed from the state courts in which a bond is given conditioned for the payment of defendants' costs, the sureties binding themselves

[12] Swindle v. State, 15 Ind. App. 415; 4 N. E. 60.

[13] Henricus v. Englert, 137 N. Y. 488; 33 N. E. 550; 51 N. Y. St. R. 200.

[14] Dunlap v. Eden, 15 Ind. App. 575; 44 N. E. 560.

[15] Blewett v. Front Street Cable Co., 49 Fed. 126, aff'd 51 Fed. 625.

[16] Donovan v. Johnson, 13 App. D. C. 356; 26 Wash. L. Rep. 714.

[17] Cimarron Land Co. v. Barton (Kan.), 33 Pac. 317.

[18] Darst v. Levy (Neb.), 58 N. W. 1130.

[19] O'Keefe v. Dyer, 20 Mont. 477; 52 Pac. 196.

[20] McClaskey v. Barr, 79 Fed. 408.

for "costs and fees in the above cases," they will be liable for all costs and fees including those in the state court, and the taxable cost due by the plaintiffs to the clerk, marshal and commissioners, and the docket fees of their attorneys.[21]

§ 1591. County auditor—Bond of.—Where a county auditor receives license taxes without authority the sureties on his bond, conditioned for the faithful performance of his official duties, will not be liable for his failure to turn over the same to the county, though it is provided by the constitution of the state that all moneys belonging to the county and coming into the hands of any officer thereof shall be immediately deposited with the treasurer.[22]

§ 1592. County clerk—Bond of.—The sureties on the bond of a county clerk are liable for fees collected by him but not mentioned in his quarterly return, though no order was made as provided by statute, for him to pay over the money, of which the court was kept in ignorance.[23] And they are also liable for waste of the estate of a ward by a guardian to whom letters of guardianship were issued by the clerk in violation of law.[24]

§ 1593. County recorder—Bond of.—No recovery can be had on the bond of a county recorder for money paid to him for recording locations of mining claims for which no provision, in the statutory system of recordation, is made.[25]

§ 1594. County treasurer—Bond of.—Recovery may be had on the bond of a county treasurer for his payments of warrants which show upon their face that they are illegal.[26] And where a bond is conditioned for the payment over of all moneys coming into his hands as treasurer, his sureties will be liable for the defalcation of moneys borrowed by the county, even though the

[21] Sawyer v. Williams, 72 Fed. 296.

[22] San Luis Obispo County v. Farnum, 108 Cal. 562; 41 Pac. 445, 447.

[23] State, Jackson County v. Chick, 146 Mo. 645; 48 S. W. 829.

[24] State, Cecil v. Christian, 13 Ind. App. 308; 41 N. E. 603.

[25] San Bernardino County v. Davidson, 112 Cal. 503; 44 Pac. 659.

[26] Ventura County v. Clay, 114 Cal. 242; 46 Pac. 9.

board of supervisors exceeded its power in borrowing such money.[27] So also for the treasurer's default, owing to the failure of the bank in which the funds are deposited, it has been decided that the sureties are also liable.[28] But evidence of an admission by a county treasurer, made after his term of office had expired, of a shortage in his accounts, is not admissible against the sureties on his bond, though it may be against the treasurer.[29] And where a bond has been accepted by the county judge in vacation as provided by statute and subsequently rejected by the circuit court, the sureties thereon will not be liable for any funds which come into his hands after such bond has been rejected and the expiration of the period thereafter, within which the principal fails to file a new bond as required by statute.[30]

§ 1595. Curator—Bond of.—Necessary expenses and fair and reasonable compensation for counsel in a proceeding by the owner of the beneficial estate to avert a risk of loss by reason of a deed of trust which the curator has placed upon the trust estate as security for his individual debt may be recovered from the sureties on his bond.[31]

§ 1596. Drainage commissioner—Bond of.—The measure of damages, in an action upon the bond of a drainage commissioner for failure to perform the work according to specifications, is the amount required to complete the work in the manner specified.[32]

§ 1597. Employment agent's bond.—In an action on an employment agent's bond, which under a statute is conditioned to pay any damages sustained by any unauthorized act, fraud or misrepresentation, and in which it appeared that such agent had falsely represented that he was authorized to employ plaintiffs

[27] Cheboygan County v. Erratt, 110 Mich. 156; 67 N. W. 1117; 3 Det. L. N. 307.

[28] Oeltjen v. People, Menard County, 160 Ill. 409; 43 N. E. 610, aff'g 61 Ill. App. 54; Fairchild v. Hedges, 14 Wash. 117; 31 L. R. A. 851; 44 Pac. 125; 42 Cent. L. J. 418.

[29] McFarlane v. Howell, 16 Tex. Civ. App. 246; 43 S. W. 315.

[30] Wood v. State, 63 Ark. 337; 40 S. W. 87.

[31] State, Patterson v. Tittmann, 134 Mo. 162; 35 S. W. 579.

[32] Smith v. State, Ingerman, 117 Ind. 167; 19 N. E. 744.

to work at a place some distance away and had sent them there, it has been decided that there can be no recovery for privation and discomfort from want of money to buy food, and pay fare home, as such elements are too remote.[33]

§ 1598. Execution creditor—Bond of.—In an action upon a bond given by an execution creditor to a sheriff which is conditioned to indemnify the latter for all counsel fees which he may incur in consequence of a levy upon and sale of the property, there may be a recovery by the sheriff of a reasonable amount as counsel fees in such action.[34]

§ 1599. Forthcoming bonds.—The measure of damages, in an action upon a forthcoming bond, which is conditioned to pay the judgment, will be the amount of such judgment.[35] But where the condition of the bond is that the property shall be produced at a certain time, the measure of damages will be the value of the property.[36] And it has been held that such value is that at the time the bond was given.[37]

§ 1600. Guardian—Bond of.—In a suit by a creditor on a guardian's bond only nominal damages are recoverable where the complaint does not state the value of the property which came into the guardian's hands or the general condition of the estate.[38] And it is a general rule in actions on such bonds that no recovery can be had against either the principal or the sureties of an amount in excess of the penalty.[39] So also, the surety is responsible only for the funds and other property really in the hands of the guardian at the time of his discharge or which should have been in his hands at such time and for the faithful payment and delivery of the same to his lawful successor or the ward or other person entitled thereto.[40] Again, in an action

[33] North v. Johnson (Minn.), 59 N. W. 1012.

[34] Tunstead v. Nixdorf, 80 Cal. 647; 22 Pac. 647.

[35] Collins v. Mitchell, 3 Fla. 4.

[36] Hammond v. Starr, 79 Cal. 556; Whelchel v. Duckett, 91 Ga.—; 16 S. E. 643; Carr v. Houston Guano & W. Co., 105 Ga. 268; 31 S. E. 178; Moon v. Story, 2 B. Mon. (Ky.) 354.

[37] Whelchell v. Duckett, 91 Ga.—; 16 S. E. 643.

[38] State v. Fitch, 113 Ind. 478; 16 N. E. 396; 13 West. 329.

[39] Anthony v. Estes, 101 N. C. 541; 8 S. E. 347.

[40] Haden v. Swepston, 43 S. W. 393; 64 Ark. 477.

on the bond of a deceased guardian, his sureties will be liable for profits of the ward's estate which accrued during the former's life and which were not accounted for by him.[41] So also, sureties are liable for an amount belonging to the ward's estate which was squandered by such guardian though the funds were realized from land which came into his possession as independent executor of the estate of the ward's mother.[42] And recovery may be had from them for any sum which the guardian might by the exercise of proper diligence have realized as income and which was lost by his neglect.[43] And they are liable for sums actually received by him as rents instead of for the rental value of the land.[44] But there can be no recovery on a guardian's bond of costs of suits to set aside settlements and discharges which were made by a ward after he became of age and had assumed control and management of his estate.[45]

§ 1601. Importer's bond.—In an action upon an importer's bond which is conditioned for the production of an invoice of the goods imported and the payment of the amount of the duty over and above the duties estimated on the appraisement, the recovery will be limited to the amount of duties and interest which will be lost to the United States as a result of the failure to produce the invoice where the amount of such loss is definite and certain.[46]

§ 1602. Indian agent's bond.—Where money is disbursed by an Indian agent in good faith for the benefit of the government, it has been decided that his sureties will not be liable for the same though he acted under a mistake of law, or of fact, or error of judgment or misconstruction of authority.[47]

§ 1603. Injunction bonds.—Where an injunction bond is

[41] Garrett v. Reese, 99 Ga. 494; 27 S. E. 750.

[42] Gillespie v. Crawford (Tex. Civ. App.), 42 S. W. 621.

[43] Beavers v. Harvey, 102 Ga. 184; 29 S. E. 163.

[44] Haden v. Swepston, 64 Ark. 477; 43 S. W. 393.

[45] Douglass v. Ferris, 138 N. Y. 192; 52 N. Y. St. R. 138; 33 N. E. 1041.

[46] United States v. Cutajar, 59 Fed. 1000.

[47] United States v. McClane, 74 Fed. 153.

given to obtain an order restraining the enforcement of a judgment, the measure of damages, in an action on such bond, will be all the damages sustained by reason of the wrongful issuing of such order.[48] And where work has been rendered valueless as the result of an order restraining the continuance of such work, the value of such as has been done may be recovered in an action on the bond.[49] So also, it has been decided that there may be a recovery for loss of time in an action by one who has been enjoined from working a mine.[50] Again, depreciation in the value of property during the operation of an injunction to restrain the defendants from selling or intermeddling with such property, may also be an element for which damages may be awarded.[51] And where property has an usable value the value of such use may be allowed where the person entitled to its use has been deprived of the same as the result of the injunction.[52] So where a bond is given to postpone the operation of an injunction, which restrains the principal from the use of a stream for floating lumber, the sureties on such bond will be liable, in an action against them for the breach thereof, for the value of the use of the stream.[53] And in addition to the value of the use of the property where the carrying on of business was restrained by the injunction, it has been decided that, where employees were under contract of service, there may be a recovery of wages paid to them.[54] Again, the loss of the amount involved in an action at law because of the insolvency of the defendants, occurring after the dissolution of the injunction against the prosecution of such action, may be recovered as damages in an action on the bond, where after the dissolution the plaintiffs were unable with reasonable diligence to obtain a trial and judgment, which, if the injunction had not been issued, might have been

[48] Gibson v. Reed, 54 Neb. 309; 75 N. W. 1085. See Dodge v. Cohen, 27 Wash. L. Rep. 334; 14 App. D. C. 582.

[49] Creek v. McManus, 17 Mont. 445; 43 Pac. 497.

[50] Muller v. Fern, 35 Iowa, 420.

[51] Lallande v. Trezevant, 39 La. Ann. 830; 2 So. 573; Brandamour v. Traut, 45 Ill. 373; Levy v. Taylor, 24 Md. 282; Meysenberg v. Schlieper, 48 Mo. 426.

[52] Hosmer v. Campbell, 98 Ill. 572; Rutherford v. Moore, 24 Ind. 311.

[53] De Camp v. Bullard, 159 N. Y. 450; 54 N. E. 26, aff'g 33 App. Div. 627; 53 N. Y. Supp. 1102. See De Camp v. Burns, 33 App. Div. (N. Y.) 517; 53 N. Y. Supp. 1035.

[54] Wood v. State, 66 Md. 61.

had before the time it was dissolved.[55] And where the erection of a stable has been restrained by injunction there may be a recovery on the bond for injury done to cows by exposure to the weather and the consequential diminution of their flow of milk.[56] But evidence is admissible that the damage was caused otherwise than by the injunction.[57] And where the entire use of property is discontinued, under an injunction which only restrains its use in such a manner as endangers the property of another, there can be no recovery for the damages which result from such total disuse.[58] So also, the defendant in an action on a bond, which restrains the cutting of timber on certain land, may show that no right to cut the timber on such land existed in the plaintiff.[59] Again, it has been decided that there should not be an allowance as for loss of sales where the injunction was habitually violated and no sales were in fact prevented thereby, even if its violation would not of itself be sufficient to prevent recovery for losses actually incurred.[60] And it has been declared that damages sustained by individual stockholders cannot be recovered, in an action by a corporation on an injunction bond, in the absence of evidence showing that they have been compelled to respond for a breach of some valid contract into which they had previously entered, and which as the result of the injunction they were prevented from performing, or that they have rightfully liquidated the claims asserted against it.[61]

§ 1604. Same subject—Mitigation of damages.—It has been determined that, in an action against the sureties on an injunction bond, it is no defense in mitigation of damages that the principal is solvent and able to pay his own debts.[62] And credit should not be given the sureties in such an action, of a sum which has been realized upon execution against the princi-

[55] Jones v. Allen, 85 Fed. 523; 56 U. S. App. 529; 29 C. C. A. 318. See Tryon v. Robinson, 10 Rich. L. (S. C.) 160.

[56] Lange v. Wagner, 52 Md. 310; 36 Am. Rep. 380.

[57] Creek v. McManus, 17 Mont. 445; 43 Pac. 497.

[58] Bancroft v. Russell (Tex. Civ. App.), 22 S. W. 240.

[59] Jenkins v. Parkhill, 25 Ind. 473.

[60] Steel v. Gordon, 14 Wash. 251; 45 Pac. 151.

[61] Eaton v. Larimer & W. Reservoir Co., 3 Colo. App. 366; 33 Pac. 218.

[62] Hunt v. Burton, 18 Ark. 188.

pals where the plaintiff's loss, in excess of that sum equals or exceeds the damages assessed against such sureties.[63]

§ 1605. Same subject—Interest.—There can be no recovery of interest upon an indebtedness represented by notes secured by a deed of trust, the enforcement of which is restrained by an injunction, where it does not appear that the proceeds of the sale after the dissolution of the injunction were less than they would have been if the sale had not been delayed.[64] And where funds are required to be held pending an injunction, there can be no recovery in an action upon the bond of the difference between legal interest and the interest actually earned on the same, where no different disposition would have been made of the fund or legal rates obtained had the injunction not been in force.[65]

§ 1606. Same subject—Expenses.—It has been decided that expenses incurred in procuring a dissolution of an injunction may be recovered in an action upon the bond where the injunction is dissolved.[66] So also, those incurred in procuring a modification of an injunction have been allowed.[67] But, in an action on a bond to recover damages for wrongfully suing out an injunction to restrain a sale under an execution, there should be no allowance as damages of charges deducted by a sheriff, as necessary expenses, from the amount made on the execution, where it does not appear that such expenses have been ascertained and allowed by the court issuing such execution.[68] And expenses attendant upon an unsuccessful attempt by motion to dissolve the injunction are not recoverable.[69]

§ 1607. Same subject—Attorney's fees.—Attorney's fees

[63] Jones v. Allen, 85 Fed. 523; 56 U. S. App. 529; 29 C. C. A. 318.

[64] Belmont Min. & M. Co. v. Costigan, 21 Colo. 465; 42 Pac. 650.

[65] Phœnix Bridge Co. v. Keystone Bridge Co., 10 App. Div. (N. Y.) 176; 41 N. Y. Supp. 891.

[66] Ten Eyck v. Sayers, 76 Hun (N. Y.), 37; 59 N. Y. St. R. 627; 27 N. Y. Supp. 588.

[67] Phœnix Bridge Co. v. Keystone Bridge Co., 10 App. Div. (N. Y.) 176; 41 N. Y. Supp. 891.

[68] Fox v. Oriel Cabinet Co., 70 Ill. App. 322. See Ralph v. Naddeo (Pa. C. P.), 15 Lanc. L. Rev. 147.

[69] Pollock v. Whipple, 57 Neb. 82; 77 N. W. 355.

incurred solely in procuring a dissolution of an injunction are generally allowed in actions upon injunction bonds.[70] But where the injunction is merely incidental to the main suit or other issues, there should be no allowance therefor.[71] And it has also been decided that there should not be an allowance therefor unless they have been paid,[72] nor unless they were reasonable in amount.[73]

§ 1608. Internal revenue collector's bond.—In a suit on the official bond of a collector of internal revenue to recover a balance found to be due from him to the United States on a settlement of his accounts, by the accounting officers, items of set-off for his extra services and expenses are properly excluded.[74]

§ 1609. Justice of the peace—Bond of.—In an action on the bond of a justice of the peace, which is conditioned for the

[70] Bolling v. Tate, 65 Ala. 417; 39 Am. Rep. 5; Belmont Min. & M. Co. v. Costigan, 21 Colo. 465; 42 Pac. 650; Wittich v. O'Neal, 22 Fla. 592; Keith v. Henkleman, 173 Ill. 137; 50 N. E. 692; 3 Chic. L. J. Wkly. 336, aff'g 68 Ill. App. 623; Robertson v. Smith, 129 Ind. 422; 28 N. E. 857; 15 L. R. A. 273; Leonard v. Capital Ins. Co., 101 Iowa, 482; 70 N. W. 629; Colby v. Meservey, 85 Iowa, 555; Mulvane v. Tullock, 58 Kan. 622; 50 Pac. 897; Aiken v. Leathers, 40 La. Ann. 23; Lamb v. Shaw, 43 Minn. 507; Elliott v. Missouri, K. & T. R. Co., 77 Mo. App. 652; 2 Mo. A. Rep. 151; Neiser v. Thomas, 46 Mo. App. 47; Creek v. McManus, 17 Mont. 445; 43 Pac. 497; Ten Eyck v. Sayers, 76 Hun (N. Y.), 37; 59 N. Y. St. R. 627; 27 N. Y. Supp. 588; Dwelle v. Wilson, 14 Ohio C. C. 551; 7 Ohio Dec. 611; State, Levy v. Medford, 34 W. Va. 633. Compare Barrett v. Bowers, 87 Me. 185; 32 Atl. 871; Crowley v. Robinson (Tenn. Ch. App.), 46 S. W. 461; Jones v. Rosedale St. R. Co., 75 Tex. 382; Wisecarver v. Wisecarver (Va. 1899), 34 S. E. 56.

[71] San Diego Water Co. v. Pacific Coast S. S. Co., 101 Cal. 216; 35 Pac. 651; Goff v. Eckert, 65 Ill. App. 616; Walker v. Pritchard, 135 Ill. 103; 11 L. R. A. 577; Leonard v. Capital Ins. Co., 101 Iowa, 482; 70 N. W. 629; Ady v. Freeman, 90 Iowa, 402; Mulvane v. Tullock, 58 Kan. 622; 50 Pac. 897; Yates v. Mead, 69 Miss. 473; 13 So. 695; Anderson v. Anderson, 55 Mo. App. 268; Gadsden v. Bank of Georgetown, 5 Rich. (S. C.) 336; Barre Water Co. v. Carnes, 68 Vt. 23; 33 Atl. 898; Donahue v. Johnson, 9 Wash. 187. Compare Jackson v. Millspaugh, 100 Ala. 285; Brownell v. Fenwick, 103 Mo. 420; Creek v. McManus, 13 Mont. 152.

[72] Creek v. McManus, 17 Mont. 445; 43 Pac. 497. But see Reich v. Berdell, 33 Ill. App. 186.

[73] Iliff v. Woodford County School Directors, 45 Ill. App. 419.

[74] Hall v. United States, 91 U. S. 559. See United States v. King, 147 U. S. 676, 680.

faithful discharge by him of his duties as justice, and that he will pay over all moneys which come into his hands as such, there may be a recovery for moneys paid to him in his official capacity and which he has failed to pay over.[75] So also, there may be a recovery on his official bond, by his successor for fees received by the former after the expiration of his term of office.[76]

§ 1610. Marshal's bond.—In a suit by a private person against a marshal on his official bond for default, the judgment should be for the damages legally assessed and not for the penalty.[77] And for the act of a city marshal in shooting and wounding one, whom he had arrested for misdemeanors only, for the purpose of recapturing him when he attempted to escape, there may be a recovery on the official bond of the marshal.[78]

§ 1611. Notary's bond.—Where, as a result of the failure of a notary to properly execute a will, as a result of which it was annulled, it has been decided that, in an action on his bond, the measure of damages is the amount which would have been received by the legatee on her legacy.[79] But where one endorses a note purporting to be secured by a trust deed, to which a false certificate of acknowledgment has been made by a notary, only nominal damages are recoverable on the official bond of the later, where an examination of the record would have shown that no person bearing the names of the supposed grantors held title to the land, and no examination was made by the indorser.[80]

§ 1612. Postmaster's bond.—In an action on the official bond of a postmaster, where there is no exception from absolute liability, there may be a recovery for money order funds of which he had the possession and which a clerk had embezzled,

[75] State, Gilman v. Bliss, 19 Ind. App. 662; 49 N. E. 1077.

[76] Morris v. People, Simmonds, 8 Colo. App. 375; 46 Pac. 691.

[77] Hagood v. Blythe, 37 Fed. 249 (U. S. Rev. St. §§ 784, 785).

[78] Rischer v. Meehan, 11 Ohio C. C. 463.

[79] Weintz v. Kramer, 44 La. Ann.—; 10 So. 416.

[80] State, Alexander v. Plass, 58 Mo. App. 148.

although the latter held his office under the civil service laws.[81] But there can be no recovery on an additional or second bond of such an official for a shortage in his account which originated prior to the time such bond was given, although he continued to owe the amount to the government.[82]

§ 1613. Probate judge—Bond of.—It has been decided that in Alabama, for the failure of the probate judge to make and deliver to the tax collector a tax roll, upon a levy of a tax by the county commissioners, a judgment creditor of the probate court may maintain an action upon the official bond of such judge and the measure of damages will be the loss and trouble caused to the plaintiff by such failure and not the amount of the tax, unless, as a result of the delay, the collection of the tax has been rendered impossible.[83]

§ 1614. Replevin bonds.—In an action to recover on a replevin bond the measure of damages will be the actual damage sustained and not the penalty of the bond.[84] And there may be a recovery of actual damages to the amount of such penalty [85] but not in excess thereof, though the value of the property may exceed the same in amount.[86] So in an action on a replevin bond conditioned for the payment of such sum as may be recovered against the principal, there may be a recovery from the sureties of the amount of the judgment which is rendered against such principal.[87] And where the bond is conditioned to pay the value of the property or redeliver the same, it has been decided that there may be a recovery of the difference between the value of substituted goods, turned over to the plaintiff in an action on such bond, and accepted only as a partial satisfaction of defendant's liability, and the agreed value of the goods replevied and agreed to be redelivered in the event of an adverse judg-

[81] United States v. Bryan, 82 Fed. 290.

[82] United States v. Van Steinberg, 77 Fed. 860.

[83] Branch v. Davis, 29 Fed. 888.

[84] Clements, Vance v. Dempsey, 7 Pa. Super. Ct. 52.

[85] Cox v. Sargent, 10 Colo. App. 1; 50 Pac. 201.

[86] Sweeney v. Lomme, 22 Wall. (U. S.) 208; Hefford v. Alger, 1 Taunt. 218.

[87] Kenley v. Commonwealth, 6 B. Mon. (Ky.) 584; Claggett v. Richards, 45 N. H. 360; Hall v. Tillman, 115 N. C. 500; 20 S. E. 726.

ment.[88] And where there is a liability on the bond for the value of the property, it has been determined that the question whether the time of fixing the value is that of the date of replevy or date of trial must depend upon the various facts and circumstances of the particular case having in view the purpose of the bond which is indemnity to the obligee.[89] So the value is declared in some cases to be that at the date of the approval of the bond where the property has subsequently depreciated in value.[90] Again, it is held to be that at the time of trial,[91] and at the time of the judgment.[92] The recovery may, however, be limited to nominal damages where it is shown that the obligee was not the owner of the property described in the bond and suffered no special damage, although the property was ordered returned to him for want of jurisdiction in the court to entertain the replevin action.[93] And where a bond is conditioned for the payment of all costs and damages and the return of the property, if it be adjudged to be returned to the defendant, it is held that there cannot be a recovery, from the sureties, of the value of the property where the judgment fails to direct its return or assess any value.[94] Again, in actions on such bonds it has been decided that there may be a recovery of costs incurred in the replevin suit with interest,[95] and also of attorney's fees which have been paid in defending such suit,[96] or which there is actual liability to pay.[97]

§ 1615. Saloon keeper's bond.—Where the death of a person has been contributed to by the sale to him of intoxicating

[88] Union Stove & Mach. Works v. Breidenstein, 50 Kan. 53; 31 Pac. 703.

[89] McLeod Artesian Well Co. v. Craig (Tex. Civ. App.), 43 S. W. 934.

[90] McLeod Artesian Well Co. v. Craig (Tex. Civ. App.), 43 S. W. 934. See also Washington Ice Co. v. Webster, 125 U. S. 426.

[91] Meyers v. Bloom, 20 Tex. Civ. App. 554; 50 S. W. 217.

[92] Filgo v. Citizens Nat. Bank (Tex. Civ. App.), 38 S. W. 237.

[93] Robinson v. Teeter, 10 Ind. App. 698; 38 N. E. 222. See Jones v. Smith, 79 Me. 452.

[94] Munding v. Michael, 2 Ohio Dec. 158; 10 Ohio C. C. 165.

[95] Gould v. Hayes, 71 Conn. 86; 40 Atl. 930. Compare Reno Woodyatt, 81 Ill. App. 553. But see contra, Henderson v. Brown, 16 Tex. Civ. App. 464; 41 S. W. 406.

[96] Dalby v. Campbell, 26 Ill. App. 502.

[97] Siegel v. Hanchett, 33 Ill. App. 634.

liquors by a saloon keeper, there may be a recovery on the bond of the latter for loss of support sustained by the widow and children of the deceased.[98]

§ 1616. Sheriff's bond.—In an action upon the official bond of a sheriff, as a general rule, the measure of damages is the actual damage which has been sustained.[99] And in an action for neglect of official duties in accepting a redelivery bond in replevin with insufficient sureties, the value of the property as found in the replevin suit is declared to be the measure of damages and not the value to be determined in an action on the sheriff's bond.[100] But where injuries are inflicted upon a person, while in the custody of the sheriff, owing to the failure of the latter to properly perform his duty, it has been decided that there can be no recovery of exemplary damages in an action on the official bond of the latter.[1]

§ 1617. Surviving partner's bond.—For the breach of a bond given by a surviving partner, that he will faithfully discharge his duties as such, the measure of damages will be the amount which would have been received in case of performance.[2] But in an action on such a bond there can be no recovery for liabilities incurred in transactions between the partners before the formation of the partnership, nor for individual liabilities of the members outside the partnership business, nor for more than the amount of the partnership estate in the hands of the surviving partner at the time the bond was executed.[3]

§ 1618. Tax collector's bond.—There may be a recovery from the surety on a tax collector's bond for moneys which he has received and failed to pay over, though they were paid for taxes improperly included in the tax list.[4] But where the bond of a tax collector, elected for a term of years, is required to be

[98] Schick v. Sanders, 53 Neb. 664; 74 N. W. 39.

[99] Taylor v. Johnson, 17 Ga. 521; State v. Johnson, 1 Ind. 158; Clifford v. Kimball, 39 Me. 413; Commonwealth v. Allen, 30 Pa. St. 49.

[100] Magnus v. Woolery, 14 Wash. 43; 44 Pac. 130.

[1] Hixon v. Cupp, 5 Okla. 545; 49 Pac. 927.

[2] Miller v. Kingsbury, 128 Ill. 45; 21 N. E. 209, aff'g 28 Ill. App. 532.

[3] Carter v. Christie, 57 Kan. 492; 46 Pac. 964.

[4] Pawlet v. Kelley, 69 Vt. 398; 38 Atl. 92.

given annually, there can be no recovery for taxes of a preceding or subsequent year.[5] And where the condition of the bond of such an official is that he shall collect funds sufficient to pay a specified judgment, it has been decided that there can be no recovery from his sureties for any amount collected in excess of such judgment.[6]

§ 1619. Titles—Bond for.—In an action on a bond for titles, or in a plea of recoupment, there can be no recovery of profits which the obligee in such bond would have made on a contract for the sale of the premises in the absence of some notice to the obligor of such contract at the time of executing the bond, or at least before there was any breach of the condition by him.[7]

§ 1620. Vendor's bond to pay assessments.—In case of the breach of a vendor's bond that certain assessments which may be levied upon the premises shall be paid by him, if the assessment which he has failed to pay exceeds the penalty of the bond, there may be a recovery of the full amount of such penalty with interest.[8]

[5] Com. Mechanicsburg v. Knettle, 182 Pa. St. 176; 38 Atl. 13; 40 W. N. C. 523.

[6] Osenton v. Burnett, 19 Ky. L. Rep. 610; 41 S. W. 270.

[7] Sanderlin v. Willis, 94 Ga. 171; 21 S. E. 291.

[8] Standard Oil Co. v. Holmes, 82 Ill. App. 476.

CHAPTER LIX.

SALES OF PERSONALTY.

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§ 1621. Breach of contract to sell—Market value—Measure of damages—Generally.—As a general rule, the measure of damages for the breach of a contract to sell and deliver goods at a certain time and place is the difference between the contract price and the market value of the same at the time and place designated.[1] So the measure of damages for breach of a

[1] Yellow Poplar Lumber Co. v. Chapman, 74 Fed. 444; 42 U. S. App. 21; 20 C. C. A. 503; Marsh v. McPherson, 105 U. S. 709; Harralson v. Stein, 50 Ala. 347; Bullard v. Stone, 67 Cal. 477; Jordan v. Patterson, 67 Conn. 473; 35 Atl. 521; Parker v. Barlow, 93 Ga. 700; 21 S. E. 213; Erwin v. Harris, 87 Ga. 333; 13 S. E. 513; Missouri & I. Coal Co. v. Pomeroy, 80 Ill. App. 144; Sleitter v. Wallbaum, 45 Ill. 43; Raw v. Trumbull, 68 Ill. App. 490; 2 Chic. L. J. Wkly. 147; Welch v. Urbarry (Iowa, 1900), 84 N. W. 497; Faulkner v. Clostir, 79 Iowa, 15; 44 N. W. 208; Osgood v. Bander, 1 L. R. A. 665; 75 Iowa, 550; 39 N. W. 887; Harrison v. Charlton, 37 Iowa, 134; Jemison v. Gray, 29 Iowa, 387; Gray v. Hall, 29 Kan. 704; Campbellsville Lumber Co. v. Bradlee (Ky.), 29 S. W. 313; 16 Ky. L. Rep. 572; Cole v. Ross, 9 B. Mon. (Ky.) 393; Jocharns v. Oug, La. Ann. 1289; Emory Mfg. Co. v. Columbia Smelting & Ref. Works, 178 Mass. 582; 60 N. E. 377; Aulls v. Young, 98 Mich. 231; 57 N. W. 119; Coxe v. Anoka Waterworks, E. L. & P. Co. (Minn. 1902), 91 N. W. 265; Halliday v. Lesh, 85 Mo. App. 285; Gill v. Johnson Brinkman Co., 84 Mo. App. 456; Chalice v. Witte, 81 Mo. App. 84; Winside State Bank v. Lound, 52 Neb. 469; 72 N. W. 486; Gordon v. Morris, 49 N. H. 376; Stevens v. Lyford, 7 N. H. 360; Saxe v. Penokee Lumber Co., 159 N. Y. 371; 54 N. E. 14, rev'g 11 App. Div. 29; 42 N. Y. Supp. 69; Todd v. Gamble, 148 N. Y. 382; 42 N. E. 982; 52 L. R. A. 225; Seckel v. Siff, 66 N. Y. Supp. 468; 32 Misc. 693; Schnitzler

contract to sell and deliver county bonds at a certain price is the difference between the agreed price and the market price.[2] And in case of a total failure of the vendors to perform a contract for the sale and delivery of machines, the vendee is entitled to recover the amount wherewith he, at the time of the breach, could have purchased machines of equal value.[3] Again, for breach of a contract to sell fruit on the trees, the general measure of damages is the market price at the orchard, or if there be no market price there, the price at the market less the cost of taking it there, if the vendee was ready to take it. Special damages for loss of time, wages paid, etc., must be alleged to be recoverable.[4]

§ 1622. Same subject continued.—A purchaser of cattle is entitled to recover from the seller on a breach by him of the contract, such usual and reasonable charges as the former is compelled to pay a railroad company for specially furnishing and holding in readiness, necessary cars for the shipment of such cattle, where it was understood by the parties that the transportation would have to be specially provided for.[5] So also, in an action for a breach of contract to sell cattle to plaintiff, evidence is admissible of the market value of the class of cattle called for in the contract in the county generally, instead of

v. Kelly, 47 N. Y. Supp. 146; 21 Misc. 327; Toplitz v. King Bridge Co., 40 N. Y. 418; 20 Misc. 576; Barnes v. Seligman, 8 N. Y. Supp. 834; 29 N. Y. St. R. 68; 55 Hun, 339; Gregory v. McDowell, 8 Wend. (N. Y.) 435; Dana v. Fiedler, 12 N. Y. 40; Smith v. Sloss Marble Head Line Co., 57 Ohio St. 518; 49 N. E. 695; 39 Ohio L. J. 197; Kinports v. Breon, 193 Pa. St. 309; 44 Atl. 436; Willock v. Crescent Oil Co., 184 Pa. St. 245; 39 Atl. 77; 28 Pitts. L. J. N. S. 351; Bicknall v. Waterman, 5 R. I. 43; College Mill Co. v. Fidler (Tenn. Ch. App. 1899), 58 S. W. 382; Coffman v. Williams, 4 Heisk. (Tenn.) 233; Palestine Cotton Seed Oil Co. v. Corsicana Cotton Oil Co. (Tex. Civ. App.), 61 S. W. 433; Steinlein v. Blaisdell, Jr. Co. (Tex. Civ. App.), 44 S. W. 200; Specialty Furniture Co. v. Kingsbury (Tex. Civ. App. 1901), 60 S. W. 1030; Day v. Cross, 59 Tex. 595; Smith v. Snyder, 82 Va. 614; Ingram v. Rankin, 47 Wis. 406; 32 Am. Rep. 762; Ashmore v. Cox [1899], 1 Q. B. 436; 68 L. J. Q. B. N. S. 72; Petterson v. Ayre, 13 C. B. 353; Feehan v. Halliman, 13 Up. Can. Q. B. 440.

[2] Feder v. Grass (Tenn. Ch. App. 1899), 59 S. W. 195.

[3] Marsh v. McPherson, 105 U. S. 709.

[4] Dabovic v. Emerich, 12 Cal. 171.

[5] Hockersmith v. Hanley, 29 Or. 27; 44 Pac. 497.

limiting it to the place within the county where the cattle were to be delivered, it being shown that there was no market at the latter place different from the market in the county generally.[6] Again, where defendant agreed to deliver ten carloads of wheat to plaintiff at an agreed price within thirty days, and delivered three only, notifying plaintiff to buy in the rest for him, thus breaking the contract, the measure of plaintiff's damages was the difference between the contract price and the cost of the seven carloads at the time of breach.[7] In another case a purchaser in Baltimore bought corn by his agent in Kansas City and directed it shipped by a certain carrier within fifteen days. The seller did not deliver as agreed, which the purchaser first in fact learned ten days after the expiration of the time. In an action for the breach it was decided that the measure of damages was the difference between the contract price and the market price at Kansas City on the last day of delivery, and the seller's agent or his carrier must have known of the default on the last day of delivery.[8] So also, in an action for the breach of a contract to deliver to the owner of a sawmill a quantity of logs, which was about sufficient to run the mill for ten days, the plaintiff has been allowed to recover the cost of keeping the mules and laborers, necessary to the operation of the mill, unemployed for such time, if the loss for the stoppage amounts to such, and the mules and teams cannot be otherwise profitably employed for so short a period.[9]

§ 1623. Same subject continued.—In assumpsit for wood delivered under a special contract, the contract price and not the value of the wood is the measure of damages, although the plaintiff has failed to comply with the contract.[10] So a "just compensation" for goods sold is their market price at the time and place of delivery.[11] And on the breach of a contract to pay, as distinguished from a contract of indemnity, the amount which would have been received if the contract had been kept,

[6] Stiff v. Fisher (Tex. Civ. App.), 21 S. W. 291.

[7] Kehler v. Einstman, 38 Ill. App. 91.

[8] Gill v. Johnson-Brinkman Com. Co., 84 Mo. App. 456.

[9] Watson v. Kirby (Ala.), 20 So. 634; 112 Ala. 436.

[10] Evans v. Chicago, etc., R. Co., 26 Ill. 189.

[11] Yulee v. Canova, 11 Fla. 9.

is the measure of damages.[12] The measure of damages for breach of a contract of sale of a right to purchase land is the difference between the contract price and the saleable value of the right when payment is to be made.[13] Where oxen are given in part payment under a contract at an agreed value, the plaintiff may upon breach of the contract recover the agreed price.[14] And if a person purchases goods in a foreign country and is sued here, the creditor can recover the amount at the par of exchange only, and is not entitled to any allowance for the rate of exchange or for the price of bills in the foreign country.[15] So where a building, for which one has contracted to furnish materials and do the carpenter work is destroyed by fire before completion, he is entitled to recover the value of materials used in the building, but not the value of materials procured for use but not used.[16] Again, the measure of damages for injury happening to goods sold, through the neglect of the vendor, between the times of the sale and the delivery, is the actual damage to the goods, irrespective of the price at which they were purchased by the vendee.[17] If the contract is to pay a certain quantity of flour for a certain quantity of wheat, the value of the flour is the measure of damages.[18] And if the covenant is to convey tobacco to a specified market and sell it for the best possible price, the criterion of damages is the best possible price deducting expenses incident to the sale.[19] In the absence, however, of proof of a price in the contract for the sale and delivery of corn, the price is the market value at the time and place of its delivery.[20] But where one seeks to recover the price of corn sold upon a contract, he cannot be allowed to prove the price of the corn at the time of the commencement of the suit, being one year after the date of the sale.[21] Nor can a buyer

[12] Wicker v. Hoppock, 6 Wall. (U. S.) 94.

[13] Telfener v. Russ, 145 U. S. 522; 36 L. Ed. 800; 12 Sup. Ct. Rep. 930.

[14] Bennett v. Phelps, 12 Minn. 326.

[15] Martin v. Franklin, 4 Johns. (N. Y.) 124.

[16] Hayes v. Gross, 162 N. Y. 610; 57 N. E. 1112, aff'g 9 App. Div. 12; 40 N. Y. Supp. 1098.

[17] Gerard v. Prouty, 34 Barb. (N. Y.) 454.

[18] Lucas v. Heaton, 1 Ind. 264.

[19] Harris v. Ogg, 1 J. J. Marsh. (Ky.) 408.

[20] Burr v. Williams, 23 Ark. 244; Wells v. Abernethy, 5 Conn. 222.

[21] Vickery v. Evans, 16 Ind. 331.

show, in an action against him for the value of the goods, that their value to him was less than that market value because not suited to his needs, where the purchase is admitted and no rejection of the goods is pleaded.[22] And the mere fact that the vendee of goods has made a bad bargain and has agreed to pay more for them than they are worth, is no defense to an action for the purchase price.[23] In an action for the price of goods which the purchaser by his own agents examined and selected, and which he himself afterwards reserved and kept without objection, it is no defense that the price agreed on was above that of the market, there having been neither fraud, misrepresentation nor warranty in the case.[24] So the breach of an agreement for the sale of a mining right does not entitle the vendor to recover the purchase money, but only to damages occasioned by the breach.[25] Nor is the failure of one who installed a manufacturing plant to make a five days' test of it as agreed, a defense to an action for the purchase price, where the defendants prevented the test from being made and thereby waived it.[26]

§ 1624. Actual damages—Remote and consequential.—The general rule as to the measure of damages in all actions for breach of contract apply to the amount of recovery for breach of a contract of sale of personal property. So only actual damages are recoverable.[27] So damages for the breach by the seller of a contract for the sale of the fixtures and the lease of a saloon, do not include the loss of wages by the buyer in consequence of his giving up his position in contemplation of the performance of the contract and remaining idle for six months.[28] Nor for the breach of a contract for the sale of bonds can there be a recovery of the profit lost by inability by reason of the breach to fulfill a contract for the resale of the bonds at an advance, in the absence of any notice to or knowledge by the party in de-

[22] Welling v. Ivoroyd, 162 N. Y. 599; 57 N. E. 1128, aff'g 15 App. Div. 116; 44 N. Y. Supp. 374.

[23] Blumenthal v. Greenberg, 130 Cal. 384; 62 Pac. 699.

[24] Miller v. Tiffany, 1 Wall. (U. S.) 298.

[25] Weatherbee v. Whitney (Can.), 30 N. S. 447.

[26] Smith v. Barber (Ind.), 53 N. E. 1014.

[27] Lippert v. Saginaw Milling Co., 108 Wis. 512; 84 N. W. 831. See secs. 1279 *et seq.* herein, as to actual damages for breach of contract.

[28] O'Conner v. Nolan, 64 Ill. App. 357.

fault of the contemplated resale.[29] So again, for a breach of a contract to deliver specified articles by a stated time, loss on account of consequent inability to fulfill a subsequent contract, with a third person, which in no way entered into such contract cannot be included in the damages awarded.[30] And there can be no recovery of damages for plaintiff's trouble and expenses in procuring the contract to be made.[31] Nor for delay in business caused thereby, nor for expenses incurred in attempting to procure the articles.[32]

§ 1625. Where no market value at place of delivery.— Where the seller fails to deliver the personalty and there is no market value for it at the place designated, it has been decided that the measure of damages for the breach will be the difference between the agreed price and the reasonable value of the same.[33] And the measure of damages may be determined by proof of the market value in other places.[34] So again, in an action for refusal to deliver structural iron, it has been declared that the best evidence for determining the damages is the value of the iron as ascertained from those experienced in dealing with property of such character.[35] And where there was a contract for resale of the goods contracted for, evidence has been held admissible of the value at the place of resale and the cost of transportation there.[36] As a general rule, however, if there is no market price at the place of delivery, the nearest available or practicable market for goods of the same kind with the cost of transportation will govern in case of a breach.[37] Again, if there

[29] Coffin v. State, 144 Ind. 578; 43 N. E. 654.

[30] Eagle Square Mfg. Co. v. Andrew (Sup. Ct.), 33 N. Y. St. R. 123; 11 N. W. Supp. 234.

[31] Stevens v. Luford, 7 N. H. 360.

[32] Porter v. Woods, 3 Humph. (Tenn.) 56.

[33] Bush v. Fisher, 85 Mo. App. 1.

[34] McDonald v. Unako Timber Co., 88 Tenn. 38; 12 S. W. 420.

[35] Warren v. A. B. Mayer Mfg. Co., 61 S. W. 644; 161 Mo. 112.

[36] Johnson v. Allen, 78 Ala. 387; Cook Mfg. Co. v. Randall, 62 Iowa, 244; Lyles v. Hagy, 15 Wkly. Dig. (N. Y.) 456; Cockburn v. Ashland Lumber Co., 54 Wis. 619.

[37] Grand Tower Co. v. Phillips, 23 Wall. (U. S.) 471; Pearce v. Carter, 3 Houst. (Del.) 385; Capen v. De Steiger Co., 105 Ill. 184; Vickery v. McCormack, 117 Ind. 594; 20 N. E. 495; Fenlong v. Polleys, 30 Me. 491; Coxe v. Anoka Waterworks Elec. L. & P. Co. (Minn.), 91 N. W. 265; Halliday v. Leah, 85 Mo. App. 285; Rice v. Manly, 66 N. Y. 82; 23 Am. Rep. 30; Patterson v. Plummer, 10 N. D. 95; 86 N. W. 111; Downey

at such rates as may be from time to time agreed upon in the future, no price having in fact ever been agreed upon, the plaintiff can recover nominal damages only.[52] And where the stock contracted to be assigned is full paid stock but the certificates transferred are not of that character and are tendered back but refused and delivery of full paid stock is refused, but the stock had no actual or market value when the delivery was so undertaken, it has been determined that only nominal damages can be recovered irrespective of the fact that defendants would have been compelled in order to perform to pay par for the stock.[53] Again, in an action on a contract for the sale of specific stock which had already been sold to another by the vendor's agent without his knowledge when the contract in suit was made, the recovery will be so limited.[54]

§ 1631. Goods or merchandise for special purpose or use. —Where a seller breaks his contract by failure to deliver, the purchaser cannot receive special damages, unless the special circumstances indicating that such damages will follow default have been communicated to him.[55] But where goods are sold for a special purpose, with notice that failure to furnish them will occasion special damage by the suspension of important work, the purchaser is entitled to recover any direct loss sustained on account of the unreasonable failure of the vendor to perform his contract including the enhanced cost of procuring them, and the direct loss due to a suspension of the work, which was a necessary and natural consequence.[56] So expense incurred

[52] Smith v. Loag, 132 Pa. 301; 19 Atl. 137.

[53] Barnes v. Brown, 130 N. Y. 372; 42 N. Y. St. R. 536; 29 N. E. 760; case affirms in part and reverses in part 55 Hun, 339; 29 N. Y. St. R. 68; 8 N. Y. Supp. 834.

[54] Wilson v. Whitaker, 49 Pa. St. 114.

[55] Gill v. Johnson-Brinkman Com. Co., 84 Mo. App. 456; Dean Pump. Works v. Astoria Iron Works (Oreg. 1901), 66 Pac. 604; Rochester Lantern Co. v. Stiles & P. Press Co., 47 N. Y. St. R. 842; 31 N. E. 1018; 135 N. Y. 209; 31 N. E. 1018; 40 N. Y. St. R. 851; Risley v. Casll, 4 Wkly. Dig. (N. Y.) 180.

[56] Vickery v. McCormack, 117 Ind. 594; 20 N. E. 495; Johnson v. Arnold, 2 Cush. (Mass.) 46; Chalice v. Witte, 81 Mo. App. 84; Horn v. Bachelder, 41 N. H. 86; Messmore v. New York Shot & Lead Co., 40 N. Y. 422; s. p. Durkee v. Mott, 8 Barb. 423; Griffin v. Colver, 16 N. Y. 480; Springfield Milling Co. v. Barnard & L. Mfg. Co. (C. C. App. 8th C.), 49 U. S. App. 438; 81 Fed. 261.

by the purchaser in obtaining an article elsewhere, there being no open market for it, may be recovered.[57] And damages for breach of a contract in failing to deliver goods with which the plaintiff intended to start in business may include loss of time between the arrival of the goods at the point to which they were shipped by the seller and the institution of the action for failing to deliver the goods.[58] Again, the difference in the cost of corn meal and cotton seed meal purchased by a stock raiser to supply the deficiency in corn meal, due to his inability to grind the amount of corn necessary for the feed of his cattle, is an element of damage in an action by him for the breach of his vendor's agreement to deliver an engine which the latter knew was to be used to grind the feed.[59] So also, in an action to recover damages for breach of a contract to furnish lumber for the construction of an elevator, it was proper to instruct the jury that if defendant failed to perform his contract, and by reason of such failure plaintiffs were unable to procure other lumber, and were compelled to keep their workman idle by reason of having no lumber to work on or were delayed in the construction of the building or put to additional expense by reason of the lumber not being delivered in proper order, they should find for plaintiffs an amount that could compensate them for the loss so sustained.[60] And where there is a breach of an entire contract to furnish coal, sufficient to keep sixty coke ovens in full operation for six months, the measure of damages will be the profits lost by the failure to comply with the contract.[61] So where a collier agreed to supply a coal merchant with coal, in accordance with the contract, which was entered into with knowledge by the collier that the merchant's purpose was to obtain a supply of coal with which to perform his contract to supply certain steamers with coal, there may be a recovery for expenses incurred in defending and reducing the recovery against him by the owners of the steamers with whom he had contracted.[62] And the rea-

[57] Gallaher v. Baird, 66 N. Y. St. R. 759; 54 App. Div. 398.

[58] Moffet-West Drug Co. v. Byrd (Idaho), 43 S. W. 864.

[59] Challis v. Witts, 2 Mo. A. Rep. 715.

[60] Clark v. Koerner, 61 S. W. 30; 22 Ky. Law Rep. 1668.

[61] Imperial Coal & C. Co. v. Port Royal Coal & C. Co., 138 Pa. 45; 20 Atl. 937.

[62] Agius v. Great Western Colliery Co. (C. A.), [1899] 1 Q. B. 413; 68 L. J. Q. B. N. S. 312.

sonable rental value of a building, during the period of delay in furnishing material to be used in its construction, may be recovered, less the amount paid by plaintiff during such period for rent, interest, taxes and attendance.[63]

§ 1632. Special damages—Where contract of resale exists.—In an action for the breach of a contract by a seller there can be no recovery on account of the purchaser's failure to fulfill his subcontracts to sell the goods to others, unless it appears that the sellers had notice of the subcontracts at the time they entered into the principal contract of sale.[64] But a purchaser of goods is entitled on a breach of the contract by the seller to recover as damages the profits on resale made by him which were known to the seller when the goods were purchased.[65] So also, it has been decided that in such a case the amount of damages recoverable from the original purchaser on a contract of resale may be recovered by the latter from the original seller as damages for the latter's breach.[66] And one who purchases cattle to resell at a given place, which fact is known to the seller, is entitled upon a breach of the contract by the latter to special damages for the difference between the contract price added to the cost of transporting them to such place and the current market price of such cattle at such place on the day it was contemplated by the parties that they should arrive there.[67] Again, where such contracts of resale are known to the seller and the purchaser is obliged to obtain goods elsewhere, the measure of damages will be the difference between the contract price and the cost to him on purchasing from others, and not necessarily the difference between the contract price and the

[63] Reich v. Colwell Lead Co., 50 N. Y. St. R. 298; 66 Hun, 634.

[64] Bunch. v. Potts, 57 Ark. 257; 21 S. W. 437; Wappoo Mills v. Commercial Guano Co. (Ga.), 18 S. E. 308; Voorheis v. Fry (Tex. Civ, App.), 52 S. W. 580. See also Williams v. Reynolds, 6 B. & S. 495.

[65] Jordan v. Patterson, 67 Conn. 473; 35 Atl. 521; Robinson v. Hyer (Fla.), 17 So. 745; Messmore v. New York State & L. Co., 40 N. Y. 422; Lane v. Townsend, 5 Hun (N. Y.), 107.

[66] Jordan v. Patterson, 67 Conn. 473; 35 Atl. 521; Carleton v. Lombard, 19 App. Div. 297; 46 N. Y. Supp. 120.

[67] Hockersmith v. Hanley, 29 Or. 27; 44 Pac. 497. Damages are to be determined by value at place of resale. Boyd v. Quinn Co., 17 Misc. (N. Y.) 278; 40 N. Y. Supp. 370, aff'd 41 N. Y. Supp. 391; 18 Misc. 169.

market value or price.[68] So also, if goods are purchased for the purpose of resale and this fact is known to the vendor, and the vendee before discovering defects in the goods sells them and they are rejected by his customers, the reasonable expenses incurred in making such resales and reasonable expenses in returning the goods to the vendee are proper elements of damages.[69] But in such an action the defendant may show that after deducting expenses no profit would have been realized by the plaintiff.[70]

§ 1633. Goods for Christmas trade.—Where goods are ordered for the Christmas trade, the proper measure of damages for delay in delivering them until after such trade is over is the fall in the market price after the close thereof.[71]

§ 1634. Delivery postponed.—The measure of damages, in an action for the breach of a contract where the time of delivery of the property sold has been extended by agreement, will be the difference between the contract price and the market price at the time designated in such subsequent agreement, or if no definite time is designated therein, then the measure of damages will be the difference between the contract and the market value at a reasonable time after demanding performance.[72]

§ 1635. Inferior article.—Where goods were purchased for resale in a foreign market, of which fact the vendor had knowledge, and it was impossible to detect the inferiority complained before the goods reached their destination, it has been decided that the measure of damages will be the difference between the market value of the goods contracted for at the date of the arrival and the price realized for those delivered, with costs and expenses of sale.[73] And for the breach of a contract to furnish sheep fit for market, there may be a recovery of the difference

[68] Theiss v. Weiss, 166 Pa. 9; 31 Atl. 63.

[69] Punteney-Mitchell Mfg. Co. v. T. G. Northwall Co. (Neb. 1902), 91 N. W. 683.

[70] Giles v. Morrison, 50 Barb. (N. Y.) 50.

[71] Davis Provision Co. v. Fowler Bros., 20 App. Div. 626; 47 N. Y. Supp. 205.

[72] Northwestern Iron & Metal Co. v. Hirsch, 94 Ill. App. 579.

[73] Camden Consol. Oil Co. v. Schlens, 59 Md. 31; 43 Am. Rep. 537.

between the value of the kind of sheep contracted for and the kind actually delivered.[74]

§ 1636. Where consideration paid in advance.—Where a contract is made for the sale and delivery of personal property and the price for the same is paid in advance, the rule has been affirmed in several decisions that the measure of damages for a breach of such contract will be the difference between the contract price and the highest market price of the same down to the time of trial.[75] So where there was a contract for the sale and delivery of a certain number of cattle and the price was paid in advance, the measure of damages upon the breach of the contract is declared to be the highest market value of said cattle between the time appointed for delivery and the day of trial.[76] And in a suit against a bank for refusing to deliver certificates of stock subscribed and paid for, the measure of damages has been held to be the value of the stock or the highest price in market at any time after demand and refusal to permit a transfer and issue scrip to the purchaser.[77] But in other cases it has been decided that if a party pays money on a consideration which fails, and in equity should be refunded, as for goods to be delivered in futuro, but not delivered, the measure of damages on the recovery back is the sum paid and interest upon it, and not the value of the goods sold at the time when by the contract they were to have been delivered.[78] Thus it has been decided

[74] Wilkins v. Burns (Tex. Civ. App.), 25 S. W. 431.

[75] Maher v. Riley, 17 Cal. 415; Kern v. Ginter, 23 Ind. 1; Gilman v. Andrews, 66 Iowa, 278; Cannon v. Folsom, 2 Iowa, 101; Clark v. Pinney, 7 Cow. (N. Y.) 681; Arnold v. Suffolk, 27 Barb. (N. Y.) 424; Bank of Montgomery v. Reese, 26 Pa. St. 143; Calvit v. McFadden, 13 Tex. 324; Randon v. Barton, 4 Tex. 289; Shepherd v. Johnson, 2 East, 211; Elliott v. Hughes, 3 F. & F. 387. See also Paton v. Newman, 51 La. Ann. 1428; 26 So. 576. A sum paid as earnest money, however, has been held not to be such a payment as to bring a case within the application of the rule. Worthen v. Wilmot, 30 Vt. 555. As to time when value is to be determined in cases of conversion, see chapter on conversion of property of fluctuating value herein.

[76] Calvit v. McFadden, 13 Tex. 324.

[77] Arnold v. Suffolk Bk., 27 Barb. (N. Y.) 424.

[78] Nash v. Tonne, 5 Wall. (U. S.) 689. See Reynolds v. Manhattan Trust Co., 83 Fed. 601, 602; Prichard v. Budd, 76 Fed. 714; Rose v. Bozeman, 41 Ala. 678; Cushman v. Hayes, 46 Ill. 145; McKenney v. Haines, 63 Me. 74; Humpheysville Copper Co. v. Copper Min. Co., 33 Vt. 92.

that in an action for breach of contract to deliver flour which has been paid for, the measure of damages is the amount so paid and not the value of the flour when it should have been delivered.[79]

§ 1637. Performance prevented.—Where the obligation of one party to a contract requires of him the expenditure of a large sum in preparation to perform, and a continuous readiness to perform, the law implies a corresponding obligation on the other party to do what is necessary to enable the first to comply with his agreement. So, where the plaintiff agreed to pack a definite number of hogs for defendant and made all his preparations to do so, and was ready to do so, but the defendant refused to furnish the hogs to be packed, the measure of damages is the difference between the cost of doing the work and the price agreed to be paid for it, making reasonable deductions for the less time engaged, and for release from the care, trouble, risk and responsibility attending its full execution.[80] So the measure of damages for the breach of a contract to purchase ties by preventing the other party from getting out more ties is the profit that might have been derived by getting out ties in conformity with the contract, and the nature of the breach excuses the party aggrieved from the necessity of having an inspection of the ties as provided by the contract.[81]

§ 1638. Delay in supplying machinery or merchandise.—For the delay of a seller in supplying a machine at the time designated, it has been determined that the measure of damages is the rental value of such machine and not the profits which might have been realized, as such estimate is conjectural.[82] So, where A contracted with B to furnish a certain machine for one

[79] Nash v. Tonne, 2 Wall. (U. S.) 689.

[80] United States v. Speed, 8 Wall. (U. S.) 77; 19 L. Ed. 449, cited Hinckley v. Pittsburg Bessemer Steel Co., 121 U. S. 264, 275, 276; 30 L. Ed. 967; United States v. Behan, 110 U. S. 338, 342; Kingman & Co. v. Western Mfg. Co. (U. S. C. C. A. 8th C.), 34 C. C. A. 489; 92 Fed. 486; Kingman & Co. v. Hanna Wagon Co., 74 Ill. App. 22, aff'd 176 Ill. 545; 52 N. E. 328.

[81] Chapman v. Kansas City, C. & S. R. Co., 146 Mo. 481; 48 S. W. 646. Compare Kentucky Union Lumber Co. v. Martin, 20 Ky. L. Rep. 1358; 49 S. W. 191.

[82] Consumers Pure Ice Co. v. Jenkins, 58 Ill. App. 519.

hundred dollars, and until it was constructed he was to let B have a machine then furnished for his use, and A delayed furnishing the last mentioned machine for three months, it was decided that the measure of damages was the value of the use of the machine during the time that B was deprived of it.[83] Again, it has been decided that where mill machinery is not delivered within the time stipulated, the measure of damages is a fair rental value of the mill for the loss of time caused by the delay, that is for the portion of the mill the machinery would have equipped. If this cannot otherwise be accurately determined by certain and determinate data which were contemplated by the parties on entering into their contract, then the law will allow the legal rate of interest upon the capital invested in the plant and other machinery kept idle during the delay. There will also be allowed losses and expenses incidental to the delay, such as insurance, idle labor, deterioration in machinery, etc.[84] And in an action against a logging company for unreasonable delay in getting the logs of a customer to market, the measure of damages is the decrease in the fair market price thereof between the time when they should have been delivered in the exercise of reasonable diligence, and that at the time when they were actually delivered.[85] But in the absence of any proof of a fall in the market price of lumber, no recovery can be had for delay in delivering a cargo of lumber under a contract, in consequence of which the purchaser is obliged to procure other lumber to fill a prior contract which he had made, except for interest on the amount paid therefor, where the party in fault for the delay had no knowledge of the prior contract or of the particular use for which the lumber was intended.[86] Again, if no actual damage is suffered, only nominal damages are recoverable for an avoidable delay on the part of sellers of goods in making shipment thereof to the purchaser.[87] And there can be no recovery for a loss which the latter could have avoided

[83] Singer v. Farnsworth, 2 Ind. 597.

[84] D. A. Tompkins Co. v. Dallas Cotton Mills (N. C. 1902), 41 S. E. 938.

[85] Palmer v. Penobscot Lumbering Asso., 90 Me. 193; 35 Atl. 108. See also Ramish v. Kirschbaum, 98 Cal. 676; 33 Pac. 780.

[86] Wheelright v. Walsh (D. C. S. D. N. Y.), 44 Fed. 380.

[87] Bunch v. Potts, 57 Ark. 257; 21 S. W. 437.

by accepting them, even though the goods were worth more than the stipulated price on the day they should have been delivered, if their value did not diminish during the short time that intervened before the day on which the sellers offered to deliver them.[88] Nor will damages be allowed in case of delay in delivering machinery, for wages of employees who were not engaged until after the contract for the machinery was made.[89]

§ 1639. Patented rights or articles.—The measure of damages for breach of a contract for the sale of an interest in patent rights is the difference between the value of the interest sold, at the time of the breach, and the contract price.[90] And where parties agreed to manufacture for appellee a number of machines at a fixed price and failed to fulfill their contract, it was decided that the measure of damages for such failure was the difference between the market value of such machines at the time they were to be delivered and the price to be paid for their manufacture, and that the circumstance that the machines were patented, and the patent right held by the vendee, did not alter such measure.[91] So again, one entitled by contract to a specified part of the net profits of the sale of a patented invention, in payment for which shares of stock were taken, may recover damages measured by the value of the stock on the day it was taken in payment.[92]

§ 1640. Sale of exclusive rights—Patents.—The measure of damages for the breach of a contract of sale to another of the right to manufacture and sell a certain article, and the seller agreeing not to manufacture or sell the same himself is the price realized by the latter for sales made by him less the cost of manufacture upon sale of the same quantity by the plaintiff.[93] Again, where, there is a sale of an exclusive right to sell, operate and place a patented invention in a certain territory, with a guar-

[88] Bunch v. Potts, 57 Ark. 257; 21 S. W. 437.

[89] Fraser v. Echo Min. & S. Co. (Tex. Civ. App.), 28 S. W. 714.

[90] Barrett v. Verdery (Ga.), 93 Ga. 526; 21 S. E. 64.

[91] Fink v. Latinan (36 Ind. 259), 10 Am. Rep. 19.

[92] Curry v. Charles Warner Co. (Super Ct.), 2 Marv. (Del.) 98; 42 Atl. 425.

[93] Champlin v. Stoddard, 34 Hun (N. Y.), 109; S. C., 30 Hun (N. Y.), 300.

antee of a life service of the patented articles for five years, and the grantor assigned his rights and interests to a third person from whom the grantee ordered and accepted the articles as wanted, the latter is obligated to pay therefor and the measure of recovery is the contract price and not the market rate, and upon a counterclaim set up by reason of sales of said articles in the territory covered by such license, the measure of damages as to sales made with plaintiff's knowledge would be the plaintiff's profits and not the profits which defendant might have made, but in the absence of proof of actual knowledge of such sales by the plaintiff the counterclaim could not be sustained; and the measure of damages as to repairs would cover only those which defendant had been obliged to make and not the estimated repairs during the remainder of the period of the guaranty of life service.[94] But expenses and time in canvassing for orders, with profits on sales, of their goods lost by failure to fill another order cannot be recovered for breach of a contract to give the plaintiff the exclusive sale of defendant's goods, where compensation for sale was to be made only by commission, and such recovery would give a greater compensation than would have been had the orders taken been filled by defendant.[95]

§ 1641. Sale and delivery of entire output.—Where a person enters into a contract to sell the entire output of his merchandise or goods to another, it has been decided that he will be liable to the latter in case of a breach of the contract for the difference between the market value of the same and the contract price therefor.[96] But where the price is by the term of the contract to be agreed upon from month to month, by the parties thereto, and no further agreement has been made as to the price, and the contract is not by its terms capable of being made certain either by reference to an umpire in case of disagreement, or by providing that in the absence of agreement the merchandise contracted for should be taken at the market price, only nominal damages are recoverable.[97]

[94] Cincinnati Siemens-Lungren G. I. Co. v. Western Siemens-Lungren Co., 152 U. S. 200.

[95] Bates v. Diamond Crystal Salt Co., 36 Neb. 900; 55 N. W. 258.

[96] Lloyd Lumber Co. v. Solon, 17 Ohio C. C. 194.

[97] Watts v. Weston (C. C. App. 2d C.), 62 Fed. 136,

§ 1642. Contract to furnish certain amount per day.—In an action to recover for the breach of a contract to furnish a certain number of logs per day, the measure of damages will be the difference between the contract price and the sum at which such logs could with reasonable diligence be procured, and it has been decided that there may be a recovery for the net profit, during any particular period during which the logs could not have been bought at any price, that would have been derived from sawing and selling the number to be furnished at such time.[98] But the recovery for the breach of a contract to furnish a specified number of logs per day is limited to the damages sustained at the time the obligor stopped delivering and the time when he commenced or offered to deliver again.[99] Again, where a contract provides for the delivery of a specified amount of coal each day, in case of a failure to deliver the amount stipulated, the damages may include those arising from the necessity of using a larger amount of coal owing to the inferior quality of that which the buyer was obliged to purchase on the market, where the seller knew that the buyer was obliged to use a large amount daily.[100]

§ 1643. Contract to sell samples—Purchaser to solicit orders.—Where a person enters into a contract to sell samples to another, with which the purchaser is to solicit orders for goods, for which he is to receive a designated commission, no damages can be recovered for a breach of such contract in the absence of evidence of any contract with any person to give orders for goods, if the samples had been sold, or of any negotiations with any person for such orders based on the selling of such samples.[1]

§ 1644. Goods consigned for sale.—It has been decided that there can be no recovery, as part of the damages for the consignor's failure to comply with their contract, for insurance paid or alleged to have been paid on goods which a purchaser had contracted to consign to commission merchants for sale.[2] And

[98] Hassard-Short v. Hardison, 114 N. C. 482; 19 S. E. 728.

[99] Hassard-Short v. Hardison (N. C.), 117 N. C. 60; 23 S. E. 96.

[100] Electric R. Co. v. Tennessee Coal T. & R. Co. (Ga.), 26 S. E. 741; 98 Ga. 189.

[1] Noble v. Hand, 39 N. E. 1020; 163 Mass. 289.

[2] Bramblett v. Feltman, 18 Ky. L.

in an action for the purchase price of goods the defendant should not be allowed the benefit of payments on goods consigned to him for sale, on the ground that he did not sell sufficient of the goods consigned to reimburse him for the payment, without setting up the facts as a counterclaim.[3]

§ 1645. Goods to be shipped.—For failure to fulfill an agreement to ship goods from one point to another, and deliver them to the vendee at the latter place, the measure of damages in the absence of any stipulation in reference thereto, is declared to be the market price at the latter place unless a custom of trade is shown to vary the rule.[4] Again, in case of failure to deliver goods at a certain place for shipment to the purchaser, the measure of damages is the difference between the contract price and the market value at the place of delivery at the time the purchaser was notified that the goods would not be delivered.[5] So also, where one received cotton to ship and sell for another and when it was received it was worth a certain price by shipping it, which value decreased very much before it was shipped, although there was no delay in shipping it, and at the time of the sale the party so receiving the cotton and selling it had offered to buy cotton at a certain price, such price will be the measure of damages, there being no other proof of value.[6]

§ 1646. Merchandise shipped to foreign country—Failure to furnish papers necessary to permit landing—Fines.—There may be a recovery from a shipper of merchandise to a foreign country for fines paid by the consignee, in consequence of the shipper's negligence in failing to furnish him with documents necessary to permit a lawful landing of such merchandise, where the necessity of such paper was known to the shipper and he agreed to furnish the same.[7]

Rep. 457; 35 S. W. 633, modified on rehearing in 37 S. W. 489; 18 Ky. L. Rep. 459.

[3] Luxemburger Tuchfabriken v. Meyer, 31 App. Div. 52; 52 N. Y. Supp. 955.

[4] Hass v. Hudmon, 83 Ala. 174; 3 So. 302.

[5] Boyd v. Quinn, 18 Misc. 169; 41 N. Y. Supp. 391, aff'g 17 Misc. 278.

[6] McIntyre v. Hall, 20 La. Ann. 217.

[7] Hecla Powder Co. v. Signa Iron Co., 157 N. Y. 437; 52 N. E. 65, aff'g 36 N. Y. Supp. 838; 91 Hun, 429; 72 N. Y. St. R. 359.

§ 1647. Sale to partner.—Where one of several partners has purchased the interest of another partner and an inventory has been taken with a view to a settlement but there is a refusal by the partnership to deliver the share of goods assigned, it has been decided that the measure of damages for such nondelivery is to be determined by the value fixed in the inventory to which all consented though there had been a subsequent decrease in the value.[8]

§ 1648. Contract to give option.—Where a corporation enters into a contract to give an option or call upon its shares at a specified price up to a certain date, but sells and transfers its assets prior to the date designated, the damages recoverable are to be based on the price which the purchasing company paid and not on the assets comprised in the contract with it.[9]

§ 1649. Refusal or failure to accept.—The vendor in case of a refusal to accept and pay for personal property may (1) store or retain the property for the vendee and sue him for the entire purchase price; (2) he may sell the property and recover the difference between the contract price and the price obtained upon a resale; or (3) he may keep the property as his own, and recover the difference between the market value at the time and place of delivery and the contract price.[10]

§ 1650. Refusal or failure to accept—Contract price—Value of goods—Partial performance—Expenses of storage

[8] Marquand v. New York Mfg. Co., 17 Johns. (N. Y.) 525.

[9] Re South African Trust & F. Co., 74 L. T. Rep. 769.

[10] Moore v. Potter, 155 N. Y. 481, 486; 50 N. E. 271; 63 Am. St. Rep. 692, per Martin, J., stating that this is the well established rule of that court and citing Van Brocklen v. Smeallie, 140 N. Y. 70; 35 N. E. 415, and several other New York decisions. That the buyer can retain the goods subject to the buyer's order and sue for the contract price after an attempt to deliver and failure, see Hass v. Pettingill, 60 N. Y. Supp. 495; 29 Misc. 318. See as to recovery of price and nonallowance of counterclaim for breach of warranty, Clark v. Cliff Paper Co., 55 App. Div. 625; 67 N. Y. Supp. 3. The seller cannot recover the contract price without a tender to the purchaser free of all incumbrances. Keppert v. Aultman, Miller & Co. (Tex. Civ. App. 1901), 61 S. W. 410. The remedy where goods are not accepted is an action for breach of the contract. Greenleaf v. Gallagher, 93 Me. 549; 45 Atl. 829.

or freight.—The measure of damages may be the price of the property with interest;[11] or the full contract price less any payments made thereon;[12] or the value of the goods contracted for;[13] or where performance in full is prevented by a refusal to accept, full compensation may be recovered for the goods actually delivered at the contract price.[14] But the expense of keeping the property cannot be recovered in an action for the purchase price whether such expense covers the period of litigation or only such time for keeping as would have enabled the party to sell it as agent for the vendee.[15] But if there is a refusal to accept the goods after freight charges have been paid in advance under agreement, such charges are a proper item of damages.[16] If notes are to be given for the deferred payments and the buyer refuses upon demand to execute the same, the seller having fully complied with his contract, recovery may be had of the full purchase price with interest from the time of delivery of the article purchased.[17] So where the purchaser of personalty agrees to convey land in part payment and to find a purchaser therefor at a specified sum or to take it himself at said price and said land is mortgaged at the time of the agreement, the difference between the mortgage amount and that for which the land is agreed to be sold is the measure of damages.[18] Again, if a time note is to be executed for the price of personal property sold and the vendee refuses compliance, the rule of damages is the contract price.[19] And one who refuses to order or select goods according to contract to purchase is liable for breach of his agreement.[20] But the contract price of delivered timber cannot be recovered by reason of the vendee's breach of

[11] McCormick Harvesting Mach. Co. v. Markert, 107 Iowa, 340; 78 N. W. 33.

[12] Hunter v. Wetsell, 84 N. Y. 549. See Valentine v. Myers Sanitary Depot, 14 N. Y. St. R. 548.

[13] Boyington v. Sweeney, 77 Wis. 55; 45 N. W. 938.

[14] Breneman v. Kilgore (Tex. Civ. App.), 35 S. W. 202.

[15] Putnam v. Glidden, 159 Mass. 47; 34 N. E. 81. Storage expenses are not recoverable. Dreyfuss v. Foster, 19 N. Y. St. R. 683; 3 N. Y. Supp. 54.

[16] Minneapolis Thresh. Mach. Co. v. McDonald, 10 N. D. 408; 87 N. W. 993.

[17] Burke v. Keystone Mfg. Co., 19 Ind. App. 556; 48 N. E. 382.

[18] Allis v. White, 70 Minn. 186; 72 N. W. 1070.

[19] Young v. Garrett (Tex.), 18 S. W. 819.

[20] Beardsley v. Smith, 61 Ill. App. 340.

a contract to purchase timber at the stump, where the timber remains uncut and there has been no offer of delivery, the measure of damages in such case being only those sustained by the breach by the vendee.[21]

§ 1651. Refusal or failure to accept—Resale.—If there is a breach of the contract, by the buyer's refusing to accept the personal property sold and to pay therefor, the seller has the right to resell the property, acting in good faith and without unreasonable delay, in the mode best calculated to produce the real value of the goods, using reasonable effort to obtain the best price therefor so as to protect the rights of the original purchaser, and the measure of damages recoverable against the latter is the difference between the contract price and the price obtained on such resale;[22] or the actual loss upon such resale,[23] or the difference between the contract price and the net proceeds of the sale of the property in the market nearest to the place of

[21] Stewart v. Scott, 54 Ark. 187; 15 S. W. 463.

[22] Magnes v. Sioux City N. & S. Co. (Colo. App. 1900), 59 Pac. 879; Lamkin v. Crawford, 8 Ala. 153; Barr v. Logan, 5 Harr. (Del.) 52; Camp v. Hamlin, 55 Ga. 259; James & Rice Co. v. Penn. Plate Glass Co., 88 Ill. App. 407 (in mode best calculated to produce the real value of the goods); Wrigley v. Cornelius, 162 Ill. 92; 44 N. E. 406; Ullmann v. Kent, 60 Ill. 273; Saladin v. Mitchell, 45 Ill. 79; Doherty v. Merchants Nat. Bk. (Ky. 1899), 52 S. W. 832; Singer Mfg. Co. v. Cheney, 21 Ky. L. Rep. 550; 51 S. W. 813 (measure of damages is the difference between the contract price at the time and place of delivery and the price obtained on resale by reasonable effort); Clore v. Robinson, 100 Ky. 402; 18 Ky. L. Rep. 851; 38 S. W. 687 (must sell at best price obtainable by reasonable effort); Marshall v. Piles, 3 Bush (Ky.), 249; Cook v. Brandeis, 3 Metc. (Ky.) 555; Young v. Mertens, 27 Md. 114; Whitney v. Boardman, 118 Mass. 242; Holland v. Rea, 48 Mich. 328; 12 N. W. 167; Strauss v. Labsoff, 59 Mo. App. 260; Moore v. Potter, 155 N. Y. 481, 486; 50 N. E. 271; 63 Am. St. Rep. 692; Duston v. McAndrew, 10 Bosw. (N. Y.) 130; Pollen v. Le Roy, 10 Bosw. (N. Y.) 38; 30 N. Y. 549; Hooper v. Bromley Bros. Carp. Co., 11 Pa. Super. Ct. 634; Girard v. Taggart, 5 Serg. & R. (Pa.) 19; Cole v. Zucarello, 104 Tenn. 64; 56 S. W. 850; Waples v. Overaker, 77 Tex. 7; 13 S. W. 527; Rosenbaums v. Weedon, 18 Grat. (Va.) 785; Pickering v. Bardwell, 21 Wis. 562. Under Okl. Stat. ch. 26, sec. 2628, the damages caused by a buyer's breach of agreement to accept and pay for personal property, the title to which is not vested in him, shall be, if the goods are resold, the excess, if any, of the amount due from the buyer under the contract over the net proceeds of the sale. See Mansur-Tebbetts Imp. Co. v. Willet, 10 Okl. 383; 61 Pac. 1066.

[23] Penn v. Smith, 93 Ala. 476; 9 So. 609.

delivery;[24] or the difference between the amount of such resale and the contract price with the expenses necessarily incurred.[25] And upon the buyer's rejection in open market of "top" lambs called for by contract, the seller has the right to resell them then and there at the highest price obtainable on that day and the best test of the market is not what other lambs brought but what those particular ones brought, and the difference between that price and the contract price is the measure of damages.[26] The rule may however be expressed in another form as follows: The measure of damages for breach of contract for the sale of personal property having a market value at the time and place of delivery, the purchasers refusing to receive and pay for it, and the appellants holding and disposing of it as their own property, they having complied with the contract on their part is the difference between the contract price and the market price, the latter being less than the former at the time and place of delivery stipulated. If the market was equal to or exceeded the contract price, there would be no actual damages and none could be recovered.[27] Still another form of the rule is, that if the goods have been resold for all they are worth, in the absence of fraud, the damages are the difference between such resale price and the contract price.[28] It is decided, however, that the measure of damages for refusal to take personal property is not the difference between the contract price and that for which the property was thereafter sold, but the difference between the contract price and the actual value.[29]

§ 1652. Same subject continued.—There may be recovered the difference between the contract price and the amount realized by the seller at public auction on notice to the purchaser, the sale being fairly conducted, even though the seller buys some of the goods, the original vendee being notified of the

[24] White v. Matador L. & C. Co., 75 Tex. 465; 12 S. W. 866; McCord v. Lindley, 87 Ga. 221; 13 S. E. 509.

[25] Slaughter v. Marlow (Ariz. 1892), 31 Pac. 547.

[26] Sanders v. Bond, 23 Ky. L. Rep. 2084; 66 S. W. 635.

[27] Nelson v. Hirshberg, 70 Ark. 39; 66 S. W. 347; Morris v. Cohn, 55 Ark. 401; 17 S. W. 342; 18 S. W. 384.

[28] Cole v. Zucarello, 104 Tenn. 64; 56 S. W. 850.

[29] Gray v. Central R. Co., 82 Hun, 523; 64 N. Y. St. R. 390; 31 N. Y. Supp. 704.

purchase.[30] And where the vendee refuses to complete his purchase and the goods are sold at public auction after an adequate opportunity to see the property and a sufficient advertisement and personal notice to the vendee, the amount realized at such resale is lawful evidence of the value of the property in an action against the vendee to recover the deficiency arising on the sale,[31] or the market value may be ascertained by the resale price,[32] and so, though the goods are sold at auction,[33] although the amount obtained on such sale must be proven.[34] It may be added however that the best price obtainable at a resale made in good faith is decided to be conclusive evidence of the market value.[35] But the market price on the latest day fixed by the contract is immaterial.[36] If the refusal is only of a part of the goods and they are resold, the discount allowed for cash should not be deducted from the gross price;[37] nor can storage nor the taxes on the goods nor the expense of an auction sale as such, be charged against the buyer where the goods are retained for some time before resale;[38] nor can there be included the time and expense of one of the sellers, in going to the place to which the goods were shipped, to make the sale.[39] It is decided how-

[30] Strauss v. Labsoff, 59 Mo. App. 260.

Notice is required to be given the vendee of the resale. Dill v. Mumford, 19 Ind. App. 669; 49 N. E. 861. That notice is necessary of resale when goods are stopped in transitu, the buyer being insolvent, see Davis Sulphur-Ore Co. v. Atlanta Guano Co. (Ga. 1900), 34 S. E. 1011; Duston v. McAndrew, 10 Bosw. (N. Y.) 130. That notice need not be given the buyer of the resale nor of the time or place thereof, Magnes v. Sioux City N. & S. Co. (Colo. App. 1900), 59 Pac. 879; Ullman v. Kent, 60 Ill. 273; Clore v. Robinson, 100 Ky. 402; 18 Ky. L. Rep. 851; 38 S. W. 687; Waples v. Overaker, 77 Tex. 7. See further as to notice, Hitchcock v. Hoyt, 33 Conn. 553; Bagley v. Findlay, 82 Ill. 524; Young v. Mertens, 27 Md. 114.

[31] Ackerman v. Rubens, 167 N. Y. 405; 60 N. E. 750; 53 L. R. A. 867, rev'g 44 App. Div. 227; 60 N. Y. Supp. 750.

[32] Pollen v. Le Roy, 30 N. Y. 549; 10 Bosw. 38; Williams v. Robb, 104 Mich. 242; 62 N. W. 352.

[33] Bigelow v. Legg, 102 N. Y. 652.

[34] Slaughter v. Marlow (Ariz. 1892), 31 Pac. 547.

[35] T. B. Scott Lumber Co. v. Hafner-Lothman Mfg. Co., 91 Wis. 667; 65 N. W. 513.

[36] Duston v. McAndrew, 10 Bosw. (N. Y.) 130.

[37] Simons v. Ypsilanti Paper Co., 77 Mich. 185; 43 N. W. 864.

[38] Tripp v. Forsaith Mach. Co. (N. H.), 45 Atl. 746.

[39] Penn v. Smith, 93 Ala. 476; 9 So. 609.

ever that the difference between the market value of the goods at the agreed time and place of delivery and the contract price with the expenses of resale is the measure of recovery, whether the contract was for goods on hand or to be specially manufactured in a particular manner for the vendee.[40]

§ 1653. Same subject concluded.—Where the goods are to be purchased at a price for which they would sell on a certain date in a certain place and upon refusal they are sold at said place some eight months later, the difference between the market price between said dates at the place of resale is the rule of damages.[41] And where the property was kept fifteen months the measure of damages is not the difference between the contract price and what the resale brought, but what the goods would bring if sold within a reasonable time after breach of the contract which was to take a certain quantity of wheat at a given price within a certain time.[42] So the difference between the contract price and that obtained on a sale some months thereafter of an equal quantity of goods for account of the purchaser is not recoverable.[43] If immediate sale is necessary to avoid loss and the price obtained is less than that of the market, a verdict for the difference is justified.[44]

§ 1654. Refusal or failure to accept—Difference between market value and contract price.—The measure of damages for refusal of the purchaser to accept and pay for goods under a contract of sale is the difference between the contract price and the market price or value of the goods at the time and place of delivery;[45] or on the day stipulated for delivery;[46] or at the

[40] Tufts v. Grewer, 83 Me. 407; 22 Atl. 382.

[41] Clifton v. Newsom, 1 Jones L. (N. C.) 108.

[42] Pickering v. Bardwell, 21 Wis. 562.

[43] Cherry Valley Iron Works v. Florence Iron R. Co. (U. S. C. C. A. 6th C.), 12 C. C. A. 306; 64 Fed. 569.

[44] Williams v. Robb, 104 Mich. 242; 62 N. W. 352.

[45] Murray v. Doud, 167 Ill. 368; 47

[46] Unexcelled Fireworks Co. v. Polites, 130 Pa. 536; 20 Pitts. L. J. N. S. 319; 25 W. N. C. 264; 47 Pluta Leg. Int. 424; 18 Atl. 1058; Kingsland & F. Mfg. Co. v. St. Louis Mall. I. Co., 29 Mo. App. 526; Cherry Valley Iron Works v. Florence Iron R. Co. (U. S. C. C. A. 6th C.), 12 C. C. A. 306; 64 Fed. 569.

time of the breach;[47] or at the time of the seller's offer to deliver them;[48] or at the time and place of refusal to accept;[49] or at the time of commencing suit;[50] or the profit which would have been made had the goods been taken and paid for according to contract and not the balance of the purchase money;[51] or the difference between the contract price and the actual value at the time.[52] And the above rules exclude the recovery of the full

N. E. 717, aff'g 63 Ill. App. 247; Kadish v. Young, 108 Ill. 170; 48 Am. Rep. 548; Ridgeley v. Mooney, 16 Ind. App. 362; 45 N. E. 348; Osgood v. Bander (Iowa), 39 N. W. 887; Lawrence Canning Co. v. H. D. Lee Mercantile Co., 5 Kan. App. 77; 48 Pac. 749; Geiss v. Wyeth Hardware & Mfg. Co., 37 Kan. 130; 14 Pac. 463; Miller v. Burch, 19 Ky. L. Rep. 629; 41 S. W. 307; Tufts v. Bennett, 163 Mass. 398; 40 N. E. 172; Schramm v. Boston Sugar Ref. Co., 146 Mass., 211; 5 N. Eng. 721; 15 N. E. 571; Williams v. Robb (Mich.), 62 N. W. 352; Parlin & Orendorff Co. v. Boatman, 84 Mo. App. 67; Whitmore v. Coates, 14 Mo. 9; Funke v. Allen, 54 Neb. 407; 74 N. W. 832; Rand v. White Mountain R. Co., 40 N. H. 79; Schwartzenbach v. Hass, 74 N. Y. Supp. 884; 36 Misc. 806; Petigor v. Ward, 74 N. Y. Supp. 867; Moore v. Potter, 155 N. Y. 481, 486; 50 N. E. 271; 63 Am. St. Rep. 692; Deery v. Williams, 27 App. Div. 131; 50 N. Y. Supp. 138; Todd v. Gamble, 148 N. Y. 382, 385; 42 N. E. 982; 52 L. R. A. 225, aff'g 74 Hun. 569; 57 N. Y. St. R. 256; 26 N. Y. Supp. 662. See *S. C.*, 67 Hun, 38; 51 N. Y. St. R. 619; 21 N. Y. Supp. 739; Windmuller v. Pope, 107 N. Y. 674; 9 Cent. 882; 14 N. E. 436; Cohen v. Platt, 69 N. Y. 348; 25 Am. Rep. 293; Heiser v. Mears, 120 N. C. 443, Andrews v. Hoover, 8 Watts (Pa.); 239; Corser v. Hale, 149 Pa. St. 274; 24 Atl. 285; Rider v. Kelley, 32 Vt. 268; T. B. Scott Lumber Co. v. Hafner-Lothman Mfg. Co., 91 Wis. 667. As to measure of damages, in case of nonacceptance, where the goods have not been resold, see Okl. Stat. ch. 26, sec. 2628; Mansur-Tebbetts Imp. Co. v. Willett, 10 Okl. 382; 61 Pac. 1066.

[47] Glasscock v. Rosengrant, 55 Ark. 376; 18 S. W. 379; Browning v. Simons, 17 Ind. App. 45; 46 N. E. 86; T. B. Scott Lumber Co. v. Hafner-Lothman Mfg. Co., 91 Wis. 667; 65 N. W. 513.

[48] Morris v. Cohn, 55 Ark. 401; 17 S. W. 342, aff'd 55 Ark. 409; 18 S. W. 384.

[49] Minneapolis Thresh. Mach. Co. v. McDonald, 10 N. D. 408; 87 N. W. 993; Dill v. Mumford, 19 Ind. App. 609; 49 N. E. 861; Pollen v. Le Roy, 30 N. Y. 549; 10 Bos. 38; Whitmore v. Coates, 14 Mo. 9; Rand v. White Mountain R. Co., 40 N. H. 79; Ganson v. Madigan, 13 Wis. 67; McNaughton v. Cassally, 4 McLean (U. S. C. C.), 530; Mann v. United States, 3 Ct. Cl. 404.

[50] Springfield Iron Co. v. Kelley, 1 N. Y. Supp. 351; 15 N. Y. St. R. 930.

[51] Fisher v. Newark City Ice Co. (U. S. C. C. A. 3d C.), 17 U. S. App. 514; 10 C. C. A. 546; 62 Fed. 569.

[52] Gray v. Central R. Co. of N. J., 82 Hun, 523; 64 N. Y. St. R. 390; 31 N. Y. Supp. 704. See 147 N. Y. 275; 69 N. Y. St. R. 702.

contract price upon the breach.[53] But the measure of damages is not necessarily the difference between the contract price and the actual value of the property.[54] Again, the rule may be stated in another form as follows: The measure of damages in an action for nonacceptance of property sold or contracted for is the amount of the actual injury sustained by the plaintiff in consequence of such nonacceptance; which is ordinarily the difference between the price agreed to be paid for it and its value where such price exceeds its value, but where the property is utterly worthless in the hands of the plaintiff the whole price agreed to be paid should be recovered.[55]

§ 1655. Refusal or failure to accept—Manufactured goods—Articles requiring labor and skill.—The difference between the contract price and the cost of manufacturing or producing goods or personal property is the measure of damages for breach of a contract by refusal or failure to accept manufactured goods;[56] or the difference between the contract price and the actual cost of manufacturing and delivering the articles contracted for;[57] or the difference between the contract price and the expense to the seller for manufacturing and preparing the goods and any other damage or expense occasioned by the refusal to accept.[58] So where the vendee refused to inspect and accept manufactured lumber, the measure of damages will be the contract price less expenses of loading, and those necessary to deliver the property if the contract requires delivery. But where the lumber is not sawed because of a refusal of the purchaser to go on with the contract, the recovery will be measured by the difference between the contract price and the

[53] Tufts v. Bennett, 163 Mass. 398; 40 N. E. 172.

[54] Browning v. Simons, 17 Ind. App. 45; 46 N. E. 86.

[55] Allen v. Jarvis, 20 Conn. 38.

[56] Crescent Mfg. Co. v. N. O. Nelson Mfg. Co., 100 Mo. 325; 13 S. W. 503; Beardsley v. Smith, 61 Ill. App. 340; American Bridge & C. Co. v. Bullen Bridge Co., 29 Or. 549; 46 Pac. 138; Walsh v. Myers, 92 Wis. 397; 66 N. W. 250. See Kelso v. Marshall, 24 App. Div. 128; 48 N. Y. Supp. 728.

[57] Dryfoos v. Uhl, 69 App. Div. 118; 74 N. Y. Supp. 532 (Fenn v. Dryfoos, 69 App. Div. 112; 74 N. Y. Supp. 528); Hinckley v. Pittsburg Bessemer Steel Co., 121 U. S. 264; 30 L. Ed. 967. See Roehm v. Horst, 91 Fed. 348; Carroll-Porter B. & T. Co. v. Columbia Mach. Co., 55 Fed. 453.

[58] Gallagher v. Whitney (Pa.), 23 Atl. 560.

cost of manufacture including the cost of the lumber, hauling, loading and freight to the place of delivery. In contracts of this character the value of the property consists chiefly in labor and skill expended.[59] And upon failure to receive telegraph poles the measure of damages is the difference between the contract price and the amount it would have cost plaintiffs to furnish and deliver the poles under the contract, said poles not being carried in stock at the place where the contract was to be performed, but obtainable elsewhere and their value being arrived at by their price at the log camp plus the transportation and cost of trimming.[60] Again, the cost of producing additional articles necessary to complete the contract is the rule of admeasurement of damages when there is a refusal to accept, and so, even though the average cost of the article is much more.[61] But if the contract is entire and to purchase a specified amount of goods at an agreed price, evidence is inadmissible of the actual cost of manufacture.[62] And on a contract to manufacture and erect a monument at a fixed price payable on delivery, the seller fulfilling as far as the buyer will permit, but the buyer refusing to comply with his agreement, it was decided that the seller could not recover the contract price but might recover the difference between that and the market price at the time and place fixed for delivery.[63] But where the article ordered to be manufactured has a marketable value, it is determined that such fact will not preclude the recovery of damages beyond the profits on the entire contract unless the value when the contract was repudiated equaled the cost of the labor and materials.[64]

§ 1656. Same subject continued.—If the article ordered is completed by the manufacturer and upon notice thereof there is a refusal or neglect to accept and pay for the same, the meas-

[59] Black River Lumber Co. v. Warner, 93 Mo. 374; 6 S. W. 210; 12 West. 323. See United States v. Speed, 8 Wall. (U. S.) 77; 19 L. Ed. 449.

[60] Berthold v. St. Louis Const. Co., 165 Mo. 280; 65 S. W. 784, citing Chapman v. Railroad Co., 146 Mo. 481; 48 S. W. 646.

[61] McCall Co. v. Icks, 107 Wis. 232; 83 N. W. 300.

[62] Kraus v. J. H. Mohlman Co., 42 N. Y. Supp. 23; 18 Misc. 430.

[63] Dwiggins v. Clark, 94 Ind. 49; 48 Am. Rep. 140.

[64] E. Keeler Co. v. Schott, 1 Super. Ct. (Pa.) 458; 38 W. N. C. 316.

ure of damages is the contract price;[65] or upon completion, tender and refusal to accept an article made to order for a stipulated price, the manufacturer furnishing the materials and doing the work, the contract price and interest from the time the money should have been paid is held to be recoverable.[66] But the damages cannot be mitigated on the ground that the manufacturer might have sold the articles during a part of the unexpired term for the same price.[67] If the intent not to comply is communicated before the articles are manufactured, it is declared that the rule applies that the damages are the difference between the cost of manufacture and the contract price and not the difference between the market value and the contract price.[68] And where goods are to be manufactured and delivered as ordered, and upon acceptance and payment of part thereof, the vendee notifies the vendor that he will not accept the balance, such balance need not be manufactured or tendered, but the measure of damages is, however, decided to be the difference between the contract price and the actual value of the goods,[69] although it has also been determined that the measure of damages for repudiating a contract before the articles to be manufactured are delivered is the difference between the contract price and the value of the articles in the condition they then were at the time of notice of refusal to the buyer.[70] Again, it is also held that the difference between the contract price and the market value of the goods at the time of the breach is the rule of indemnity for a breach of the contract before the work is completed;[71] or in case of a refusal to accept the amount of damages that accrues to the vendor up to the time of the repudiation of the contract;[72] or the difference between the cost of producing the goods and the contract price should be reduced by the profits

[65] Ballentine v. Robinson, 46 Pa. St. 177.

[66] Shawhan v. Van Nest, 25 Ohio St. 490; 18 Am. Rep. 313.

[67] Crescent Mfg. Co. v. N. O. Nelson Mfg. Co., 100 Mo. 323; 13 S. W. 503.

[68] Kingman v. Western Mfg. Co. (U. S. C. C. A. 8th C.), 34 C. C. A. 489; 92 Fed. 486.

[69] Todd v. Gamble, 67 Hun, 33; 51 N. Y. St. R. 619; 21 N. Y. Supp. 739.

[70] Tufts v. Lawrence, 77 Tex. 526; 14 S. W. 165.

[71] Heiser v. Mears, 120 N. C. 443; 27 S. E. 117.

[72] Tufts v. Stuart (Tex. Civ. App.), 23 S. W. 834.

realized from using the material for manufacturing other articles;[73] or the difference between the contract price and the market price at the time of delivery, and not the difference between the contract price and the cost of furnishing lumber;[74] or where railroad ties are to be delivered on the line of a railway, only the actual damages for loss of material can be recovered,[75] and where one orders chairs to be manufactured under a contract to furnish materials and to pay for the work, he should be allowed more, on breach of the contract by him, for materials nearly manufactured into chairs, than a sum which is proportionately less by a very large amount than the value of said chairs.[76]

§ 1657. Same subject continued—Condition of goods with relation to a market or value, etc., upon breach—Expenses.—If the purchaser has the exclusive right to sell the article to be manufactured within a specified territory, thereby leaving the vendor no market for said article and there is a refusal to accept by the vendee, the cost of raw material should be considered and also the expense of labor necessary to complete the finished article and the difference between such amount, or cost of manufacturing and delivery, and the contract price is the measure of damages, even though the ordinary rule is the difference between the market and contract price; but expenses of carrying on the business cannot be included under such a contract.[77] Again, actual value of goods to be manufactured and delivered, and acceptance of which is refused as to a part thereof may be shown by the market price, or if there be none, by the cost of production, but it must be proven first that there is no market price to admit evidence of said cost.[78] But in the absence of evidence showing that a market price can be found for so large a quantity of goods as those called for by contract,

[73] Diamond State Iron Co. v. San Antonio & A. P. R. Co., 11 Tex. Civ. App. 587; 33 S. W. 987.

[74] Miller v. Burch, 19 Ky. L. Rep. 629; 41 S. W. 807.

[75] Walker v. Wilmington, C. & A. R. Co., 26 S. C. 80; 1 S. E. 366.

[76] Roberts v. Wells, 4 App. Div. 395; 38 N. Y. Supp. 845.

[77] Kingman & Co. v. Hanna Wagon Co., 74 Ill. App. 22, aff'd 176 Ill. 545; 52 N. E. 328, citing Baltimore & O. R. Co. v. Stewart, 79 Md. 487; 29 Atl. 964; Masterson v. Brooklyn, 7 Hill (N. Y.), 61; 42 Am. Dec. 38, and other decisions.

[78] Todd v. Gamble, 67 Hun, 38; 51 N. Y. St. R. 619; 21 N. Y. Supp. 739.

the acceptance of which has been refused, the rule of damages is the difference between the contract price and the cost of production; but the price for which a small portion of the goods can be sold is no criterion as to the market value of the whole.[79] If the article to be manufactured is perishable in its nature precluding its being kept only a short time, and the demand therefor is limited, there being no real market for it and it is only manufactured for consumers, upon refusal to accept the measure of damages is the difference between the cost of manufacture and delivery and the contract price, and the fact that at the time of the breach there was a price at which sales could be made is not controlling.[80] So where a party has contracted for a large quantity of a thing in a manufactured state, and refuses thereafter to take it, evidence is properly admissible that material in a raw state had been so far prepared to manufacture the thing contracted for, as that it was injured for anything else and that there was no sale in the market for the thing contracted for and refused, and evidence that others offered or undertook at another time to make the article at a less sum is inadmissible where the contract is for a greater sum for making said article at the time contracted for.[81] And if there is a refusal to take an installment of goods to be manufactured and there is no tender thereof, even though there is a notice of readiness to deliver and a demand that said goods be taken and some of them are destroyed by fire, the measure of indemnity is not the contract price but the difference between it and the market price.[82]

§ 1658. Same subject concluded—Waiver.—The right to damages, for the failure of the vendee to accept under a contract for the manufacture and sale of goods may be waived by a subsequent agreement changing in effect the term of the contract.[83]

§ 1659. Refusal or failure to accept—Nominal damages.—

[79] Kelso v. Marshall, 24 App. Div. 128; 48 N. Y. Supp. 728.

[80] Todd v. Gamble, 148 N. Y. 382; 42 N. E. 982, aff'g 74 Hun, 569; 57 N. Y. St. R. 256; 26 N. Y. Supp. 662.

[81] Chicago v. Greer, 9 Wall. (U. S.) 726.

[82] Neal v. Shewalter, 5 Ind. App. 147; 31 N. E. 848.

[83] Rogers Silver Plate Co. v. Jennings, 67 Conn. 400; 35 Atl. 281.

Where the contract is a plain and unconditional one of purchase and sale, the refusal to accept renders the vendee liable for nominal damages at least.[84] So if plaintiff proves a valid contract and its breach, but fails to prove actual loss or market value or the absence of such value, he is entitled to nominal damages in case the purchaser refuses to accept the articles sold,[85] although the recovery should not be confined to nominal damages where railroad ties are injured by exposure to sun and weather while left upon the right of way upon the company's refusal to accept them because a claim is wrongfully made to them and a sale thereof is lost.[86] So more than nominal damages can be recovered where the goods are sold at auction with due notice to the purchaser and an opportunity to inspect the goods.[87] There can, however, be recovered no more than nominal damages for refusal to receive manufactured goods in the absence of evidence that they are, or have been since the time of sale, of less value than the contract price.[88] If an action is commenced for the breach of contract to purchase personal property before the date fixed for delivery and the loss of prospective profits is not pleaded, only nominal damges will be awarded.[89]

§ 1660. Conditional sales—Installments—Distinction—Generally.—It may be generally stated that there is a distinction between conditional sales and other contracts of sale since ordinarily in the former case the title remains in the seller as security for the purchase money.[90]

[84] Holliday v. Leslie, 85 Mo. App. 285.

[85] Petiger v. Ward, 74 N. Y. Supp. 867.

[86] Alabama State Land Co. v. Slaton, 120 Ala. 259; 24 So. 720.

[87] Ackerman v. Rubens, 167 N. Y. 405; 60 N. E. 750; 53 L. R. A. 867, rev'g 44 App. Div. 227; 60 N. Y. Supp. 750.

[88] Hemingway Mfg. Co. v. Council Bluffs Canning Co. (U. S. C. C. S. D. Iowa), 62 Fed. 897.

[89] Miller v. Burch, 19 Ky. L. Rep. 629; 41 S. W. 407.

[90] See as to title, Simpson v. Shackelford, 49 Ark. 63; 4 S. W. 165; Pinkham v. Appleton, 82 Me. 574; 20 Atl. 23; Ballantyne v. Appleton, 82 Me. 570; 20 Atl. 235; Singer Mfg. Co. v. Ballard, 62 N. H. 129; Luther v. Cote, 61 N. H. 129; Empire State Type F. Co. v. Grant, 114 N. Y. 70; 22 N. Y. St. R. 302; 21 N. E. 49; Brewer v. Ford, 54 Hun, 116; 26 N. Y. St. R. 888; 7 N. Y. Supp. 244; Perry v. Young, 105 N. C. 463; 11 S. E. 511; Russell v. Harkness, 4 Utah, 197; 7 Pac. 865; McComb v. Donald, 82 Va. 903; De Saint Germain v. Wind, 3 Wash. Ter. 189; 13 Pac. 753. See as to what do and what do

§ 1661. Refusal or failure to accept—Installments—Conditional sale—Vendor and vendee.—Unless the vendee repudiates the entire contract or rejects all future installments, it is decided that the vendor cannot recover damages for failure to accept all the property under a contract to deliver in installments,[91] although in case of such a contract for delivery the seller is not restricted to his remedy for damages, nor is the vendee relieved from liability to pay the entire price by refusal to accept the article.[92] And the full contract price is recoverable where the vendee refuses to receive goods under a contract to pay for them in installments, the title to remain in the vendor until full payment,[93] and the vendee may be liable to the vendor for the value of timber sold by him under a contract of conditional sale so providing.[94] But the vendee is not liable for the purchase price after the contract right to take possession of the property has been asserted by the vendor,[95] although if the

not constitute conditional sales and distinctions between, Lundy Furniture Co. v. White, 128 Cal. 170; 60 Pac. 759; Perkins v. Metler, 126 Cal. 100; 58 Pac. 384; Mack v. Story, 57 Conn. 407; 18 Atl. 707; Evans v. Napier, 111 Ga. 102; 36 S. E. 426; Gorham v. Holden, 79 Me. 317; 4 N. Eng. 502; 9 Atl. 894; W. Irving Schermerhorn Bros. Co. v. Herold, 81 Mo. App. 461; Bennett Bros. v. Tam, 24 Mont. 457; 62 Pac. 780; Hughes v. Harlam, 166 N. Y. 427; 60 N. E. 22; Equitable Gen. Prov. Co. v. Eisentrager, 68 N. Y. Supp. 866; 34 Misc. 179; Jacob v. Haefelien, 54 App. Div. 570; 66 N. Y. Supp. 1007; A. D. Puffer & Sons Mfg. Co. v. Lucas, 112 N. C. 377; 17 S. E. 174; 19 L. R. A. 682; Yinger v. Clark (Pa.), 17 Lanc. L. Rev. 377; 7 North Co. R. 298; Dearborn v. Raynor, 132 Pa. 231; 20 Atl. 690; Talbot v. Sandifer, 27 S. E. 624; Lang v. Rickmers, 70 Tex. 108; 7 S. W. 527; Baldwin v. Van Wagner, 33 W. Va. 293; 10 S. E. 716; McGinnis v. Savage, 29 W. Va. 362; 1 S. E. 746; Ransin Mfg. Co. v. Richards, 69 Wis. 671; 35 N. W. 42; Arkansas Valley L. & C. Co. v. Mann, 130 U. S. 69; 32 L. Ed. 854; 9 Sup. Ct. 458; Metropolitan Trust Co. v. Railroad Equip. Co., 48 C. C. A. 135; 108 Fed. 913.

[91] Lee v. J. B. Sickles Saddlery Co., 38 Mo. App. 201.

[92] White v. Solomon, 164 Mass. 516; 42 N. E. 104; 30 L. R. A. 537.

[93] Tufts v. Poness, 32 Ont. 51.

[94] Western v. Brown, 91 Hun, 639; 71 N. Y. St. R. 624; 36 N. Y. Supp. 675. See Wilkinson v. H. C. Akely Lumber Co. (Minn.), 57 N. W. 941.

[95] Turk v. Carnahan (Ind. App. 1900), 57 N. E. 729. See Laclede Power Co. v. Estate of Ennis Stat. Co., 79 Mo. App. 302; 2 Mo. App. Rep. 416. See note 32 L. R. A. 455, as to right to recover purchase price where property destroyed; to recover value of property on default; to recover value of property in trespass.

sale is not a conditional one but vests an absolute title in the vendee, he is liable for the price.[96]

§ 1662. Same subject continued.—If a vendor elects to treat a conditional sale as absolute and sues for the purchase price, it is decided that he waives his right to hold the title as security.[97] Again, a contract of conditional sale may provide that payments on account of the purchase money shall be forfeited as damages upon failure of the vendee to fulfill the contract.[98] And an action will lie for each installment as it falls due where the title is not to pass until the purchase price is paid in full;[99] or a deficiency between the amount obtained on a resale may be recovered or the unpaid balance may be recovered under a contract so providing in case of default.[100] And under the Missouri statute the vendee is entitled to a return of the installments paid, less certain deductions for use of the property and actual breakage or damage in case the vendor elects to retake the property.[1]

[96] First Congregational Church v. Grand Rapids School Furn. Co., 15 Colo. App. 46.

[97] Smith v. Barber, 153 Ind. 322; 53 N. E. 1014. See Albright v. Meredith, 58 Ohio St. 194; 39 Ohio L. J 391; 50 N. E. 719; Richards v. Schreiber, 98 Iowa, 422; Sawyer v. Baskerville, 10 Manitoba R. 652. But see Canadian Teleg. Co. v. Macgum, 119 Mich. 533; 5 Det. L. N. 899; 78 N. W. 542. Examine White v. Smith, 28 N. S. 5, and note 32 L. R. A. 455.

[98] Waterous Eng. Works Co. v. Hochelaga Bk., Rap. Jud. Quebec, 5 B. R. 125.

[99] Gray v. Smith, 64 App. Div. 231; 71 N. Y. Supp. 1015, citing and distinguishing several New York decisions.

[100] Warren v. Zeuchel, 19 App. Div. 494; 46 N. Y. Supp. 569. See Dederick v. Wolfe, 68 Misc. 500; 9 So. 350. But see Sawyer v. Pringle, 18 Ont. App. 218.

[1] McArthur v. St. Louis Piano Co., 85 Mo. App. 525; Rev. Stat. 1899, secs. 3412, 3413. Examine Hayes v. Jordan, 85 Ga. 741; 11 S. E. 833; 9 L. R. A. 373; White v. Oakes, 88 Me. 367; 34 Atl. 175; 32 L. R. A. 592; Tufts v. D'Arcambel, 85 Mich. 185; 48 N. W. 497; 12 L. R. A. 446; 19 Wash. L. Rep. 403; Cottrell v. Carter R. & Co., 173 Mass. 155; 53 N. E. 375; Pub. Stat. ch. 192, sec. 13; Laclede Power Co. v. Estate of Ennis S. Co., 79 Mo. App. 302; 2 Mo. App. Rep. 416; Rev. Stat. Mo. 1899, sec. 5181; Crabtree v. Seagrist, 3 N. M. 278; 6 Pac. 202; Cavanaugh, v. Bloom, 8 Ohio N. P. 6; 10 Ohio S. & C. P. Dec. 222; Rev. Stat. sec. 4155; Baker v. Speyer, 12 Ohio C. C. 118; 1 Ohio C. D. 135; Metropolitan Trust Co. v. Columbus S. & H. Co. (U. S. C. C. S. D. Ohio), 93 Fed. 702; Ohio Act, May 4, 1885; Tschopick v. Lippincott (Tenn. Ch. App.), 48 S. W. 128; Act, 1889, ch. 81; Tufts v. Giroux, Rap. Jud.

§ 1663. Refusal of government official to accept.—In the court of claims the government is liable for what it has agreed to purchase. But when an individual, who has been absolved from such a contract, by the refusal of the proper officer to receive the articles when tendered, afterwards consents to deliver them under a threat of the officer that he will withhold money justly due the plaintiff, he can only recover the contract price, whatever may have been the current market value of the articles.[2]

§ 1664. Refusal or failure to accept—Seller to purchase for delivery—Partial performance—Uncertainty of basis for estimation.—Where the contract was not for a specified number of pounds of beef fit for canning at a certain price per pound, but was for such an amount as could be obtained from two thousand cows fit for canning purposes, and the number of pounds they would produce could, in advance of their being slaughtered, only be estimated, and only eight hundred and sixty cows had been purchased for delivery when the defendant refused to perform the contract, the evidence, as to estimated weight of dressed carcasses of the cattle so purchased, was a basis of determining the probable weight of the entire dressed carcasses to be delivered and the market price, and the total number of pounds of the carcasses produced should be multiplied by the difference between the contract price and the market price.[3]

§ 1665. Refusal or failure to accept—Particular cases.—If the contract is a continuing one to receive supplies and there is a refusal to perform, the measure of damages is the difference between the contract price and that for which responsible parties will assume like liabilities.[1] Again, if property is sold for a note on another than the purchaser who fails to deliver the note, the measure of damages will be what the note purports to be worth and not the value of the property at the time of

Quebec, 12 C. S. 530; Waterous Eng. Works v. Hochelaga Bk., Rap. Jud. Quebec, 5 B. R. 125; note 32 L. R. A. 455.

[2] Gibbons v. United States, 8 Wall. (U. S.) 269. See Langford v. United States, 101 U. S. 341, 346; United States v. Behan, 110 U. S. 338.

[3] Fletcher v. Jacob Dold Pack. Co., 41 App. Div. 30; 58 N. Y. Supp. 612, aff'd 169 N. Y. 571; 61 N. E. 1129.

[4] Roehm v. Horst (U. S. C. C. A. 3d C.), 62 U. S. App. 520; 33 C. C. A. 550; 91 Fed. 345, aff'g 84 Fed. 565.

sale with interest,[5] or if the contract is one of bailment upon refusal to accept the goods there can be no recovery of the value thereof.[6]

§ 1666. Avoidable consequences.—Consequential damages from breach of a contract as to the sale of chattels cannot be recovered, where the purchaser could have avoided such consequences by the exercise of ordinary prudence and judgment.[7] Thus where repairs to a machine can be easily made, a buyer should take reasonable steps to have the repairs made and to make the seller's liability as light as possible.[8] So where mules were infected with a contagious disease, a recovery was not allowed of damages for the spread of the disease to other animals as a result of failure on the part of the purchaser to exercise proper prudence.[9] And a purchaser of a stallion which proves worthless and not as represented with respect to breeding qualities is bound upon discovering the fact to act with reasonable promptness and has no right to retain it an indefinite length of time after discovering the seller's false representations and to recover from the seller the expense of taking care of it.[10] Again, the duty to minimize loss requires a buyer upon breach by the seller of a contract to sell goods upon credit, to accept the latter's unconditional offer to sell at a reduced price for cash on delivery, where he is able to accept it, and goods of that kind and quality are not purchasable from other parties.[11] So a purchaser of goods who did not fulfill his subcontracts to sell them to others, owing to an avoidable delay in their shipment by the sellers, cannot recover therefor if he might by making a reasonable effort have obtained a substitute for the goods in time to fulfill his subcontracts and at a price

[5] Fenton v. Perkins, 3 Mo. 23.

[6] Stimpson Computing Scale Co. v. Schetrompf, 13 Pa. Super. Ct. 377.

[7] York-Draper Mercantile Co. v. Lusk, 6 Kan. App. 629; 49 Pac. 788; Omaha Coal C. & L. Co. v. Fay, 37 Neb. 68; 55 N. W. 211; Parsons v. Sutton, 66 N. Y. 92; McHose v. Fulmer, 73 Pa. St. 365.

[8] Frick Co. v. Falk, 50 Kan. 644; 32 Pac. 360.

[9] Snowden v. Waterman, 31 S. E. 110; 105 Ga. 384.

[10] Dawson v. Vickrey, 150 Ill. 398; 37 N. E. 910.

[11] Lawrence v. Porter (C. C. App. 6th C.), 26 L. R. A. 167; 11 C. C. A. 27; 63 Fed. 62.

that would not have reduced his profits.[12] But where goods are to be shipped from a foreign country the purchaser is not bound to make an effort to purchase other goods, so as to reduce the damages for the seller's refusal to comply with the contract, until a reasonable time for the goods to reach the place of delivery after the final date of shipment fixed by the contract.[13]

§ 1667. Contract to purchase at market price—Grain.—For breach of a contract to purchase grain at the market price, it is proper to compute the measure of damages upon the basis of the last available quotations in the possession of the parties at the time, consisting of the quotations of the evening before in a morning paper.[14]

§ 1668. Fictitious market price—Corner in market.—In estimating the damages for breach of a contract to sell an article or commodity, the fictitious and temporary price of the same, resulting from a "corner" in the market, is not the true market value, and the jury is at liberty to determine, from the price immediately before and after the date for delivery and from other sources of information, the actual market value.[15]

§ 1669. Products.—Where a purchaser breaks his contract to buy all the merchantable peaches grown in the orchard of another, it has been decided that the seller may leave the peaches in the orchard and recover the contract price or sell them at the buyer's risk and recover such loss as he has sustained.[16] And where a person contracts to accept a certain quantity of fruit and market the same under a guaranty of sale, but makes no effort to sell such fruit and permits it to decay, the measure of damages is not the difference between the fruit which has gone to waste and the purchase price, but the difference between the latter and the value of the oranges when they might have been sold.[17] Again, where corn is lost by a flood or rendered worth-

[12] Bunch v. Potts, 57 Ark. 257; 21 S. W. 437.

[13] Austrian v. Springer, 94 Mich. 343; 54 N. W. 50.

[14] Nash v. Classen, 163 Ill. 409; 45 N. E. 276.

[15] Kountz v. Kirkpatrick, 72 Pa. St. 376; 13 Am. Rep. 687.

[16] Darby v. Hall, 3 Penne. (Del.) 25; 50 Atl. 64.

[17] Tustin Fruit Asso. v. Earl Fruit Co. (Cal.), 53 Pac. 693.

less in consequence of a failure of the purchaser to take the same at the time agreed, the measure of damages will be the price of the corn.[18] Where there is a contract for the sale of the products of a farm and the seller puts it out of his power to complete the contract by selling the same to another, the purchaser under such contract may recover damages for the full injury occasioned by such breach.[19] But for the breach of a contract to deliver a stipulated quantity of fruit from certain orchards where complete performance is prevented because of drought, it has been decided that damages are not recoverable.[20]

§ 1670. Stocks.[20a]—It has been decided that for the breach of a contract to purchase stock the measure of damages is the price, where a formal tender is made.[21] But where there has been no tender, it has been declared that the measure of damages is the difference between the contract price and the market value of the stock at the time and place of delivery with interest.[22] And a sale of stocks bought on an exchange to the highest bidder is a fair basis upon which to determine the amount of damages sustained by a purchaser's refusal to take the stock, when at the time of the sale, the exchange has been closed by order of its governing committee, and the sale is made to the highest bidder after proper notice to the purchaser, with opportunities for full and open competition.[23] But where the expenditure to be made by a person contracting for the purchase of bonds, in case the sale is made, will be greater than the damage resulting from a breach of the contract of sale, the buyer is not injured by the breach and cannot recover.[24] For breach of a contract of a sale of stock it has been decided that the measure of damages is the difference between the contract price and the market price at the

[18] Monarch v. Matthews, 10 Ky. L. Rep. 482; 9 S. W. 500.

[19] Crist v. Armour, 34 Barb. (N. Y.) 378.

[20] Ontario Deciduous F. Assn. v. Cutting Fruit-Packing Co., 134 Cal. 21; 66 Pac. 28; 53 L. R. A. 681.

[20a] See secs. 1146 *et seq.* and 1408 *et seq.* herein.

[21] Thompson v. Alger, 72 Metc. (Mass.) 428.

[22] Corser v. Hale, 1 Pa. Adv. R. 780; 24 Atl. 285.

[23] Clens v. Jamieson, 182 U. S. 461; 45 L. Ed. 183; 21 S. Ct. 845, aff'g 96 Fed. 648; 38 C. C. A. 473.

[24] Feder v. Gass (Tenn. Ch. App.), 59 S. W. 175.

time of breach,[25] and where a seller contracts to take back upon notice or at a certain time and at a certain price a part or all of the stocks sold, the purchaser may, for a breach of such contract, upon an offer to transfer back the stock, coupled with a present ability to do so, recover the stipulated price as damages.[26] So again it has been decided that in such a case the purchaser may recover an assessment which he has been compelled to pay thereon after giving the required notice.[27] And if a person in consideration of property, not money, to be assigned by another, agrees to give a certain number of shares of stock, having on the day of contract a fixed market value, and refuses to give the stock, evidence of the value of the stock at any other time than at the date of the contract is rightly excluded, its value at that date being agreed on and admitted.[28]

§ 1671. Agreement as to freight.—Where an agent of a manufacturer sells goods for the latter and agrees with the seller that he will pay the freight thereon, but the written contract of sale between the manufacturer and the seller provides that the latter shall pay the freight, there can be no recovery, in an action by the seller against the agent for the freight paid, of damages for loss of time, etc., in defending a suit by the manufacturer for the freight charges, since such damages are declared to be too remote.[29]

§ 1672. Profits—When allowed.—The loss of profits which are not too uncertain, remote, contingent or speculative, which may fairly have entered into the contemplation of the parties to the contract of sale and which are the direct, immediate and proximate result of the breach of said contract and represent the actual loss sustained by reason of said breach, may be recovered.[30] Within this rule profits have been allowed under a contract to furnish material and complete work;[31] for the sale

[25] Rand v. White Mt. R. R. Co., 40 N. H. 79; Jones v. Chamberlain, 30 Vt. 196; Shaw v. Holland, 15 M. & W. 136.

[26] Thorndike v. Locke, 98 Mass. 340.

[27] Gay v. Dare, 103 Cal. 454; 37 Pac. 466.

[28] Humaston v. Telegraph Co., 20 Wall. (U. S.) 20.

[29] Carraher v. Allen, 112 Iowa, 168; 83 N. W. 902.

[30] See note 52 L. R. A. 209.

[31] Tennessee & C. R. Co. v. Danforth (Ala.), 13 So. 51.

of ice lost by breach of contract of purchase;[32] from breach of contract to take lumber to be manufactured and delivered;[33] the net profits to a seller of goods which would have accrued from an execution of the contract;[34] the net profits lost from failure to deliver hogs to be slaughtered;[35] profits from failure to deliver the output of lumber mill for a year;[36] from refusing to accept articles purchased;[37] for delay in delivering a dredge, the particular use for which it was intended, being known to the seller;[38] for breach of contract to furnish logs and butts to be converted into timber;[39] for breach of contract to furnish harrow teeth with reference to the season's trade;[40] for breach of a contract to furnish wire and set up an arc meter;[41] for bicycles purchased and returned to the seller because defective;[42] for refusal to furnish goods for sale on which an annual allowance and discount in the contract price was to be allowed;[43] the fair ordinary net profits for failure to put up certain machinery and a mill;[44] for loss on sales by a retailer of goods to be furnished by a wholesaler;[45] for breach of an agreement to furnish a jewelry store, a showcase and shelving;[46] for breach of a contract to deliver a lecture;[47] for deprivation of use of a melting furnace to be constructed;[48] for failure to order a stated number of wagons during a specified period of

[32] Tahoe Ice Co. v. Union Ice Co., 109 Cal. 242; 41 Pac. 1020. See Newark City Ice Co. v. Fisher (U. S. C. C. A. 3d C.), 39 U. S. App. 335; 22 C. C. A. 281; 76 Fed. 427.

[33] Hale v. Trout, 35 Cal. 229.

[34] Hanser B. & Co. v. Tate, 20 Ky. L. Rep. 1716; 49 S. W. 475.

[35] Thompson v. Jackson, 14 B. Mon. (Ky.) 114.

[36] Barr v. Henderson, 105 La. 691; 30 So. 158.

[37] Baltimore & O. R. Co. v. Braydon, 65 Md. 223; 9 Atl. 126; 7 Cent. 396.

[38] Industrial Works v. Mitchell, 114 Mich. 29; 4 Det. L. N. 467; 72 S. W. 25.

[39] Barrett v. Grand Rapids V. Works, 110 Mich. 6; 3 Det. L. N. 256.

[40] Harrow-Spring Co. v. Whipple Harrow Co., 90 Mich. 147; 51 N. W. 197.

[41] Silberstein v. Duluth N. T. Co., 68 Minn. 430; 71 N. W. 622.

[42] Burr v. Redhead N. L. Co., 52 Neb. 1058; 72 N. W. 1058.

[43] Ellis v. Miller, 164 N. Y. 434; 58 E. E. 516, rev'g 47 N. Y. Supp. 824.

[44] Davis v. Talcott, 14 Barb. (N. Y.) 611.

[45] Smith v. Sipe (Ohio), 25 Ohio L. J. 364.

[46] Dickinson v. Hart, 50 N. Y. St. R. 504; 21 N. Y. Supp. 307.

[47] Savery v. Ingersoll, 46 Hun (N. Y.), 176.

[48] Dixon-Woods Co. v. Phillips Glass Co., 169 Pa. St. 167; 32 Atl. 432.

time;[49] for inability to furnish an agreed quantity of ice at an agreed price owing to a failure to furnish an ice plant;[50] for preventing the purchase of goods at a certain price which had been contracted to be sold at a profit;[51] for failure to deliver lumber contracted to be sold at a profit;[52] and for failure to furnish goods brought to fulfill another contract, the seller having knowledge of such purpose.[53] Again, where defendant agreed to purchase from the plaintiff rails to be rolled by the latter "and to be drilled as may be directed" and to pay for them a stipulated price per ton, and refused to give directions for drilling, and, at his request, the plaintiff delayed rolling any of the rails until after the time specified for delivery, and then defendant advised plaintiff that he should decline to take any rails under the contract, it was decided that the plaintiff was obliged to roll the rails and tender them to defendant and that the proper rule of damages was the difference between the cost per ton of making and delivering the rails and the stipulated price.[54] The rule, however, is subject to the proviso that defendants' profits on sales made by them above the price they were required to pay for the goods, does not equal or exceed the cost of performance.[55]

§ 1673. Profits—When not allowed.—Profits cannot be recovered for a resale negotiated by the buyer after his purchase;[56] nor where the loss of estimated profits for six months is from one and a half to three times the price of a brick-drying machine;[57] nor for losses from contracts with third persons, but

[49] Cooper v. Wells (Tex. Civ. App. 1894), 25 S. W. 151.

[50] Alamo Mills Co. v. Hercules Iron Works, 1 Tex. Civ. App. 683; 22 S. W. 1097.

[51] Western Un. Teleg. Co. v. Brown, 84 Tex. 54; 19 S. W. 336. See Robinson v. Hyer, 35 Fla. 544; Violet v. Rose, 39 Neb. 660; Houston & T. C. R. Co. v. Hill, 70 Tex. 51; Loney v. Oliver, 27 Ont. 89.

[52] Trigg v. Clay, 88 Va. 330; 13 S. E. 434.

[53] Guetzkow Bros. Co. v. Andrews, 92 Wis. 214; 66 N. W. 119; 42 Cent. L. J. 305.

[54] Hinckley v. Pittsburg Bessemer Steel Co., 121 U. S. 264. See Kingman & Co. v. Western Mfg. Co., 92 Fed. 489; Boehm v. Horst, 91 Fed. 348; Carroll-Porter Boil. & T. Co. v. Columbus Mach. Co., 55 Fed. 453.

[55] Ellis v. Miller, 164 N. Y. 434; 58 N. E. 516, rev'g 47 N. Y. Supp. 824.

[56] Penn v. Smith, 104 Ala. 445; 18 So. 38; Jordan v. Patterson, 67 Conn. 473; 35 Atl. 521.

[57] Monthrop v. Hyatt (Ala.), 17 So. 32.

for a vendor's failure to deliver machinery;[58] nor where the contract was simply for the delivery of certain logs and the performance of which did not involve the use of any particular instrumentality or the exercise of all or any great portion of the time or personal attention of the party damaged;[59] nor from a resale of cotton to a third person;[60] nor from the refusal of the other party to take a larger quantity of wood than it did take, where he did not tender, procure, or provide at any time such larger quantity;[61] nor for a refusal to surrender wheat under a contract;[62] nor under a contract of sale of a physician's practice;[63] nor from the entire quantity of cream purchased by a rival creamery in a certain territory;[64] nor for breach of a contract to take such amount of barrels as the other party needed for its use in its flour mill, where the capacity of the flour mill is not stated or agreed upon by the terms of the contract;[65] nor profits which might have been realized during the time of the delay in delivering a boat hull where the buyer received it after the time for delivery;[66] nor for the failure of the seller to deliver the goods as agreed and consequent loss of retail sales;[67] nor for the breach of a contract of a manufacturer to consign his products to another for a term of years;[68] nor for delay in delivering machinery within the time specified;[69] nor for breach of a contract to deliver a quantity of pelts;[70] nor generally for speculative profits for nondelivery of articles;[71] nor for delay in delivering machinery for a smelter, where the purchaser at the time of the purchase had no reasonable certainty that a

[58] Reed Lumber Co. v. Lewis, 94 Ala. 626; 10 So. 333.

[59] Sullivan v. McMellan, 37 Fla. 134; 19 So. 40.

[60] Orr v. Farmers Alliance W. H. & C. Co., 97 Ga. 241; 22 S. E. 937.

[61] Savannah, F. & W. R. Co. v. Griffin, 96 Ga. 225; 23 S. E. 115.

[62] Kinnaird v. Dudderar (Ky. App. 1900), 54 S. W. 847.

[63] Reigney v. Monette, 47 La. Ann. 648; 17 So. 211.

[64] Davis v. Davis, 84 Mich. 324; 47 N. W. 555.

[65] Doud v. Duluth Mill Co., 55 Minn. 53; 56 N. W. 463.

[66] Taylor v. Maguire, 13 Mo. 517.

[67] Denver, T. & G. R. Co. v. Hutchins, 31 Neb. 572; 48 N. W. 398.

[68] Matter of Adams, 15 Abb. N. C. 61; 67 How. Pr. 284.

[69] D. A. Tompkins Co. v. Dallas Cotton Mills (N. C. 1902), 41 S. E. 938.

[70] Peirson v. Duncan, 162 Pa. 187; 29 Atl. 733.

[71] Porter v. Woods, 3 Humph. (Tenn.) 36.

profit could be made;[72] nor general profits expected to be realized from the sale of ice during a given season;[73] nor for a failure to deliver specific articles sold, unless the data are certain and definite and the party in fault had notice when the contract was made that such damage would ensue from nonperformance;[74] nor extraordinary and unusual profits lost by a purchaser of goods on account of the vendor's failure to comply with his agreement;[75] nor profits which could have been made on a sale which was defeated by another party selling at a lower price;[76] nor any profit or gain the plaintiff might have obtained by exchange or otherwise;[77] nor expected profits from the resale of a business to a syndicate.[78]

§ 1674. Judicial sale.—A purchaser at a judicial sale under a judgment is liable for rents.[79] And where one purchases personal property at such sale and without notice that another claimed or owned the property, the measure of damages is the market value of the property at the time the same came into the purchaser's possession with legal interest on that amount from that date, and having come into possession thereof, without wrong on his part, he should not be held liable for special damages for the value of its hire while in possession of the vendee, nor is evidence admissible of the value of the hire of said property prior to defendant's obtaining possession. In such case the ordinary rule in cases of conversion of personal property and damages applies.[80] But where the judgment is reversed because the suit was prematurely brought, the measure of damages for sale thereunder is the costs of suit, counsel fees and other

[72] Fraser v. Echo Min. & S. Co. (Tex. Civ. App.), 28 S. W. 714.

[73] Alamo Mills Co. v. Hercules Iron Works, 1 Tex. App. 683; 22 S. W. 1097.

[74] Hamilton v. Schumacher (Tex. App.), 15 S. W. 715.

[75] Guetzkow Bros. Co. v. Andrews, 92 Wis. 214; 42 Cent. L. J. 305; 66 N. W. 169.

[76] Cincinnati S.-L. G. I. Co. v. Western S.-L. Co., 152 U. S. 200; 38 L. Ed. 411; 14 Sup. Ct. Rep. 523.

[77] Gilpin v. Consequa, Pet. (U. S. C. C.) 85.

[78] Loewer v. Harris (C. C. App. 2d C.), 6 C. C. A. 394; 57 Fed. 368.

[79] Walworth v. Stevenson, 24 La. Ann. 251. See 31 Cent. Dig. cols. 114–116, sec. 96, and examine Hendrix v. Nesbitt, 20 Ky. L. Rep. 1066; 40 S. W. 963.

[80] Huckins v. Kopf (Tex. App. 1889), 14 S. W. 1016.

expenses incident to the sale, less the amount of the debt satisfied by the sale.[81] If the purchaser pays a part of the price and then abandons the sale, the measure of damages is the difference between his bid and the bid obtained at the sale.[82] And if a purchaser at a master's sale refuses to pay his bid and the court thereupon refuses to release him and orders a resale at his risk and expense, he is not entitled to any benefit from the resale, in case the property brings a larger price than before.[83] Again, upon an application to confirm a judicial sale, the issue being whether the bid was greatly less than the sale, evidence may be given of the market value of the timber at near-by markets, there being no market on the land so sold, and also of the cost of marketing said timber.[84] In case a purchaser at a judicial sale is relieved from the purchase on account of a mistake, he should be charged with the costs of a resale.[85] And where a resale of property is ordered because of a purchaser's failure without cause to comply with his contract or to pay the amount of his bid, he will be charged with any deficiency which may arise,[86] including expenses from the noncompletion of the purchase, the application and the resale.[87]

§ 1675. Sale—Receivers.—The value of the owner's interest in property sold by the receiver at the time he took possession thereof, and the actual loss occasioned by suspension of business of the debtor during such possession constitutes the measure of damages for improperly appointing such receiver.[88] And where the property of an insolvent debtor is sold by receivers and the

[81] Fush v. Egan, 48 La. Ann. 60; 19 So. 108.

[82] Appeal of Tindle, 77 Pa. (27 P. F. Smith) 201. See Anthony v. Casey, 83 Va. 338; 5 S. E. 176; 5 Am. St. Rep. 277.

[83] Chase v. Joiner, 4 Pick. (Tenn.) 761; 14 S. W. 331.

[84] Ladd v. Ladd, 121 Ala. 583; 25 So. 627.

[85] Vingut v. Vingut, 62 Hun, 622; 17 N. Y. Supp. 159.

[86] Sproul v. Seay, 74 Ga. 676. See Harder v. Sayle-Stegall Com. Co., 61 Ark. 66; 31 S. W. 979; Tyler v. Guthrie (Ky.), 33 S. W. 934; McCarter v. Finch, 55 N. J. Eq. 245; 36 Atl. 937; In re Pettillo, 80 N. C. 50; Murphy v. Hardee, 22 Ohio Cir. Ct. R. 517; Haig v. Commissioners, etc., 1 Desaus (S. C.), 144; Fulton v. Davidson, 3 Heisk. (Tenn.) 614; Stout v. Philippi Mfg. & M. Co., 41 W. Va. 339; 23 S. E. 571; 56 Am. St. Rep. 843. Examine 31 Cent. Dig. cols. 48–50, sec. 52.

[87] Camden v. Mayhew, 129 U. S. 73; 9 Sup. Ct. 246; 32 L. Ed. 608.

[88] Haverly v. Elliott, 39 Neb. 201; 57 N. W. 1010.

fund held for distribution and judgment creditors are enjoined from enforcing their executions, damages may be recovered in the amount of the judgment, together with interest, less the amount held for distribution in the receiver's hands, where but for said injunction the judgments would have been satisfied out of the property.[89]

§ 1676. Sale of judgment.—The amount agreed to be paid for a judgment measures the damages for breach of a contract for its purchase where the consideration is the conveyance by the judgment creditor of title to certain land bid in on foreclosure of the judgment lien.[90]

§ 1677. Set-off, counterclaim and recoupment.—In an action on a contract of sale the defendant may ordinarily, by conforming to whatever requirements as to pleading or practice exist, avail himself of a set-off or counterclaim, or may rely upon recoupment where the circumstances are such as to justify the same.[91] So a loss resulting from breach of contract of the vendor not to manufacture or sell articles of the same character to any one else, may be set up in counterclaim to an action for the price

[89] Dodge v. Cohen, 14 App. D. C. 582; 27 Wash. L. Rep. 334.

[90] Schmaltz v. Weed, 27 App. Div. (N. Y.) 309; 50 N. Y. Supp. 168.

[91] Moore v. Barber Asphalt Pav. Co., 23 So. 798; 118 Ala. 563 (not allowed); Davis v. Hurgren, 125 Cal. 48; 57 Pac. 684; Penn. Steel Castings & M. Co. v. Wilmington Malleable Iron Co., 1 Penn. (Del.) 337; 41 Atl. 236; Port Kennedy Slug Works v. Mitchell, 1 Penn. (Del.) 220; 40 Atl. 190 (not allowed); George H. Hess Co. v. Dawson, 149 Ill. 138; 36 N. E. 557, aff'g 51 Ill. App. 146 (not allowed); Christy v. Jones, 39 Kan. 183; 18 Pac. 56 (not allowed); Hurlburt, Hess & Co. v. Fyock, 73 Iowa, 477; 35 N. W. 482 (not allowed); Escanaba Boom Co. v. Two Rivers Mfg. Co., 118 Mich. 454; 5 Det. L. N. 564; 76 N. W. 980 (not allowed); Mack v. Snell, 140 N. Y. 193; 55 N. Y. St. R. 576; 35 N. E. 493; Sielvrecht v. Siegel-Cooper Co., 38 App. Div. 549; 56 N. Y. Supp. 425; Rose v. Wells, 36 App. Div. 593; 55 N. Y. Supp. 874; Anderson v. Williams, 44 W. N. C. 418; 10 Pa. 329 (not allowed); Pierpont Mfg. Co. v. Goodman Produce Co. (Tex. Civ. App. 1900), 60 S. W. 347; Sabine Trans. Co. v. Jones (Tex. Civ. App.), 43 S. W. 905; Lowenstein v. Chappell, 30 Barb. 241 (qualified); Arlington First Nat. Bank v. Lynch, 6 Tex. Civ. App. 590; 25 S. W. 1042; Washington & G. R. Co. v. American Car Co. (D. C. App.), 23 Wash. L. Rep. 241, denied 23 Wash. L. Rep. 246; Stewart v. Townsend (C. C. D. S. C.), 41 Fed. 320 (not allowed); Biggerstaff v. Rowatt's Wharf. (L'd) (C. A. 1896), 2 Ch. 93; 65 L. J. Ch. N. S. 536; 74 Law T. Rep. 473.

of goods sold.[92] And a counterclaim for breach of a warranty may also be filed and it is proper to refuse an instruction to the jury in such a case that there can be no recovery on the counterclaim unless the offer to return was made within a reasonable time after the delivery of the goods, where the defects did not develop until some time after they were delivered.[93] And in an action by the vendor of machines, the purchaser can show by way of recoupment, though he received and used the machines, that they were not constructed according to the contract, or suitable for the purpose for which they were intended.[94] So also, where under a written contract there exists an obligation to furnish goods it is error, in an action for goods sold, to dismiss a counterclaim for damages for plaintiff's refusal to furnish goods.[95] Again, in an action to recover the price of a sawmill sold to defendants, they may plead by way of set-off and counterclaim the damages suffered by the seizure and sale of the mill under a void judgment in plaintiff's favor, provided they did not consent to the sale.[96] But in an action by the seller of railway ties for their purchase price, it has been decided that the purchaser cannot recoup damages paid by him to the owner of a vessel for delay in furnishing the ties for loading under a contract between the two, where such seller had nothing to do with the contract between the purchaser and the vessel owner.[97] And in an action by the vendor of a harvesting machine to recover the purchase price, breach of agreement by plaintiff to put the machine in repair does not entitle defendant to recoup as damages, injury to his grain because not harvested in time.[98]

§ 1678. Interest.—Interest may be allowed for unreasonable and vexatious delay in payment.[99] So interest may be al-

[92] Blauner v. Williams Co., 73 N. Y. Supp. 165; 36 Misc. 173, aff'g 69 N. Y. Supp. 749. See also Dushane v. Benedict, 12 U. S. 630.

[93] South Bend Pulley Co. v. Caldwell Co. (Ky. 1899), 54 S. W. 12.

[94] Iroquois Furnace Co. v. Wilkin Mfg. Co., 54 N. E. 987; 181 Ill. 582, rev'g 77 Ill. App. 59.

[95] Ellis v. Miller, 164 N. Y. 434; 58 N. E. 516, rev'g 47 N. Y. Supp. 824. See also Kelley M. & Co. v. Caffrey, 79 Ill. App. 278; 17 Nat. Corp. Rep. 759.

[96] Aultman & Taylor Co. v. Mead, 22 Ky. L. Rep. 1189; 60 S. W. 294.

[97] Barker v. Turnbull, 51 Ill. App. 226.

[98] Warden, Bushnell & G. Co. v. Meyers (Neb. 1902), 89 N. W. 387.

[99] Carlin v. Brown, 80 Ill. App. 541.

lowed on damages for breach of warranty of sale from the date of the breach to the time of trial.[100] It may also be allowed on a counterclaim;[1] also on the price of goods sold and delivered without proof of the amount;[2] also on each item of an account showing dates of purchase and maturity;[3] also upon damages recovered on breach of a contract of purchase;[4] and also on the cost of a mill during delay in its operation occasioned by the machinery purchased being unfit for use.[5] But interest is not recoverable for breach of a contract to purchase a steamboat, which has no market value and defendant had no knowledge of the extent of the damages sustained by said breach.[6]

§ 1679. Pleading.—Special damages are not, it has been decided, recoverable unless alleged and proved.[7] But it is not necessary to allege the market value of the goods, in an action for refusal to deliver where no consequential damages are sought to be recovered.[8]

§ 1680. Notice of refusal to perform, or countermand before time of performance.—It has been claimed in many cases that if the seller gives notice to the purchaser of a refusal to perform or that if the purchaser on the other hand countermands the purchase prior to the date of performance, the damages should be estimated on the basis of the value at the time of giving such notice. Such a rule does not, however, appear to have received judicial sanction except in those cases where the notice has been accepted and acted upon by the other party

[100] Brown v. Doyle, 69 Minn. 543; 72 N. W. 818.

[1] Fishell v. Winans, 38 Barb. (N. Y.) 228.

[2] Peetsch v. Quinn, 7 Misc. 6; 57 N. Y. St. R. 80; 27 N. Y. Supp. 323.

[3] Dunham v. Halloway, 3 Okla. 244; 41 Pac. 149.

[4] Woods v. Cramer, 34 S. C. 508; 13 S. E. 660.

[5] New York & C. M. S. & Co. v. Fraser, 130 U. S. 611; 32 L. Ed. 1031; 9 Sup. Ct. 665.

[6] Gray v. Central R. Co., 157 N. Y. 483; 52 N. E. 555, aff'g 80 Hun, 477; 69 N. Y. St. R. 808; 35 N. Y. Supp. 378. See further as to nonrecovery of interest: Pickett v. Handy, 9 Colo. App. 357; 48 Pac. 820; Harvey v. Hamilton, 54 Ill. App. 507, aff'd 155 Ill. 377; 40 N. E. 592; Baker v. Turnbull, 51 Ill. App. 226.

[7] Brady v. Cassidy (C. P.), 9 Misc. 107; 59 N. Y. St. R. 729; 29 N. Y. Supp. 45.

[8] Riverside Coal Co. v. Holmes, 36 Neb. 858; 55 N. W. 255.

to the contract as a breach of the same, in which case the rule of avoidable consequences has been held to apply.[9] And as a general rule the measure of damages in such cases is, as in other cases of a breach of a contract of sale of personal property, the difference between the contract price and the market value of the same at the time of the breach which is considered as that of the time set for performance.[10] So for the purchaser's breach of a contract for the purchase of a quantity of sugar by countermanding his order, the measure of damages is the difference between the market value of the sugar at the time of delivery and the price fixed by the contract, and not the difference between the contract price and the market value at the time of the countermand.[11] And where the seller gave notice to the purchaser of his inability to furnish a certain amount of tallow in accordance with the contract of sale, and it did not appear that the purchaser had assented to the rescission of the contract, it was declared that the value of tallow on the day when delivery should have been made under the contract should govern as to the measure of damages and not the value on the date notice was given.[12] But where goods are to be manufactured it has been determined that the seller has no right, where the purchaser countermands his order before the work is completed, to complete the work and charge the purchaser with the cost thereof.[13] And where a machine is to be made to order it has been decided that the measure of damages in such a case is the contract price less the value of the machine as it was when the work was stopped, and the cost of completion and setting it up in place, where the machine when the work was stopped had no market value except as metal.[14] Again, in another case it is decided that the measure of damages for failure of a purchaser to receive a soda fountain ordered to be manufactured, but which he countermanded before any part was made, is the net profit

[9] Roper v. Johnson, L. R. 8 C. P. 167; Frost v. Knight, L. R. 7 Ex. 111.

[10] Kadish v. Young, 108 Ill. 170; Adler v. Kiber, 5 Tex. Civ. App. 415; 27 S. W. 231; Hochster v. De La Tour, 2 E. & B. 678; Boorman v. Nash, 9 B. & C. 145; Cort v. Ambergate N. B. & E. J. R. Co., 17 Q. B. 127.

[11] Adler v. Kiber, 5 Tex. Civ. App. 415; 27 S. W. 23.

[12] Leigh v. Patterson, 8 Taunt. 540.

[13] Heiser v. Mears, 120 N. C. 443; 27 S. E. 117.

[14] Thomas v. Caldwell (N. Y. Super. Ct.), 58 N. Y. St. R. 142; 26 N. Y. Supp. 785.

which would have been realized had the contract been performed.[15]

§ 1681. Evidence—What admissible.—The burden of proof is upon the plaintiff to show that there has been a failure on the part of the defendant to deliver the specific property contracted for.[16] And it has been decided that in an action to recover damages for failure to deliver goods sold to the plaintiff, the price of which increased after the purchase, there can be no recovery by him unless it is shown that the sale was on time or that he tendered payment or was ready and willing to pay for them when demand for their delivery was made.[17] So again, it has been held essential to the recovery of damages for failure to deliver the amount contracted for, to show that other similar merchandise could not have been procured in place of that not delivered, and also the market value at the time and place of delivery stipulated for in the contract.[18] And transactions in corporate stock, as well as options and prices at which such stock has been sold or optioned, are admissible in evidence to determine the actual value of stock, where it has no market value.[19] So evidence of the value of a stock of goods at a specified time is competent to show its value at the time of the sale a month later, when supplemented by the evidence of other witnesses who examined the goods a day or two before the sale.[20] Again, evidence of the price at which goods which defendants agreed to manufacture for plaintiffs would have been retailed is relevant in an action for breach of the contract.[21] And it has been held, in an action for failure to deliver iron purchased, that evidence as to the value of that character of iron by those acquainted with the market value thereof, was admissible in estimating the value of the iron in determining the damages.[22] Again, if ma-

[15] Tuft v. Weinfeld, 88 Wis. 647; 60 N. W. 992. See also Cameron v. White, 5 L. R. A. 493; 74 Wis. 425; 43 N. W. 155.

[16] Raw v. Ball Bros. Glass Mfg. Co., 21 Ind. App. 147; 1 Repr. 221; 15 N. E. 945.

[17] Sexton v. Brown, 86 Ill. App. 281.

[18] Kinports v. Breon, 193 Pa. St. 309; 44 Atl. 436.

[19] Moynahan v. Prentiss, 10 Colo. App. 295; 51 Pac. 94.

[20] Connor v. Levinson, 115 Mich. 297; 4 Det. L. N. 858; 73 N. W. 232.

[21] Jordan v. Patterson, 67 Conn. 473; 35 Atl. 521.

[22] Warren v. A. B. Meyer Mfg. Co., 161 Mo. 112; 61 S. W. 644.

chines are not delivered at the stipulated time or places, or were not then in proper condition, proof that they were subsequently delivered, or that the vendee, after accepting them, permitted the vendors to make the requisite repairs and additions thereto, is admissible to reduce his damages for breach of contract.[23] So the vendor may show that the vendee could have obtained from a third party at the contract price, goods of the same kind and character as were called for by the contract.[24]

§ 1682. Evidence—What not admissible.—Evidence is inadmissible of a price agreed upon by the purchaser with a third person.[25] Nor can the market value of such goods at times, other than that of the breach, be shown for the purpose of fixing damages.[26] And when the market value at the place of performance is clear and explicit, evidence is not admissible as to the market price at a place other than the place of performance.[27] Again, evidence of the market value of coal is inadmissible in an action on a contract to sell at the price paid by a certain railroad company, the best evidence being the books of the company.[28] Nor is evidence admissible of the fact that a person refused to purchase property at a specified price to show that it was not of a greater value than such price.[29] And in an action to recover damages for a breach of contract to deliver hogs purchased by plaintiffs, it has been decided that it is not competent for the plaintiffs to show that they had sustained loss by reason of not having the hogs to complete the loading of cars, which they had hired subsequent to the purchase for the transportation of hogs.[30] So also, evidence is not admissible of an offer of plaintiff, in an action for damages for inducing

[23] Marsh v. McPherson, 105 U. S. 709.

[24] Saxe v. Penokee Lumber Co., 11 App. Div. 291; 42 N. Y. Supp. 69.

[25] Ramish v. Kirschbaum, 90 Cal. 581; 27 Pac. 433; Galveston, H. & S. A. R. Co. v. Efron (Tex. Civ. App. 1897), 38 S. W. 639.

[26] Freedman v. Dobson, 61 N. Y. St. R. 1115. See also Ramish v. Kirschbaum, 90 Cal. 581; 27 Pac. 433.

[27] Citing Durst v. Burton, 47 N. Y. 167; 7 Am. Rep. 428; Cahen v. Platt, 69 N. Y. 348; 25 Am. Rep. 203. Compare Lawrence Canning Co. v. H. D. Lee Mercantile Co., 5 Kan. App. 77; 48 Pac. 749.

[28] Lucas Coal Co. v. Delaware & H. Canal Co., 1 Pa. Adv. R. 517; 23 Atl. 990.

[29] Reynolds v. Franklin, 47 Minn. 145; 49 N. W. 648.

[30] Cuddy v. Major, 12 Mich. 368.

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the purchase of property by false representations to compromise his difference with defendant before the commencement of the suit.[31]

[31] Boyce v. Palmer, 55 Neb. 389; 75 N. W. 849.


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